TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1936

No. 703

OLD COLONY TRUST COMPANY, TRUSTEE,
PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 4, 1937.

CERTIORARI GRANTED MARCH 15, 1937.

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

October Term, 1935

No. 3145

OLD COLONY TRUST COMPANY, Trustee, Petitioner for Review,

vs.

COMMISSIONER OF INTERNAL REVENUE

BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 74928

OLD COLONY TRUST COMPANY, Trustee Under an Indenture of Trust of Paul Wilde Jackson, Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Appearances:

For Petitioner: Francis V. Barstow, Esq.
For Respondent: Hartford Allen, Esq.

DOCKET ENTRIES

1934

Feb. 20. Petition received and filed. Taxpayer notified. (Fee paid.)
Feb. 21. Copy of petition served on General Counsel.
Apr. 21. Answer filed by General Counsel.
May 1. Copy of answer served on taxpayer.
Sept. 26. Hearing set Nov. 14, 1934.
Nov. 5. Motion to amend petition, embodying amendment, filed by taxpayer. 11/6/34, granted.
[fol. 2] Nov. 8. Copy of motion and amendment to petition served on General Counsel.
Nov. 12. Motion for continuance to Nov. 21, 1934, filed by taxpayer. 11/12/34, granted.
Nov. 15. Answer to amendment to petition filed by General Counsel.

DOCKET ENTRIES—Continued

1934.

Nov. 19. Copy of answer to amendment served on taxpayer.

Nov. 21. Hearing had before Mr. Murdock, Division 3, on merits. Oral argument on both sides. Stipulation of facts filed. Petitioner's brief filed at hearing—served on General Counsel—petitioner's reply in 30 days. Commissioner's brief filed—copy served—Commissioner allowed 30 days to reply.

Nov. 27. Transcript of hearing Nov. 21, 1934, filed.

Dec. 13. Reply brief filed by taxpayer. 12/14/34, copy served.

1935.

Oct. 29. Opinion rendered—Mr. Murdock, Division 3. Decision will be entered under Rule 50.

Nov. 29. Motion for decision under Rule 50 filed by General Counsel—no objection by taxpayer endorsed thereon. 12/2/35, copy served.

Dec. 13. Decision entered—Division 3.

1936.

Mar. 11. Petition for review by U. S. Circuit Court of Appeals, First Circuit, with assignments of error filed by General Counsel.

Mar. 11. Supersedeas bond in the amount of $43,000.00 approved and ordered filed.

Mar. 11. Petition for review by U. S. Circuit Court of Appeals, First Circuit, with assignments of error filed by taxpayer.

Mar. 11. Proof of service filed by taxpayer.

Mar. 11. Præcipe filed by taxpayer.

Mar. 11. Proof of service of præcipe filed by taxpayer.

Mar. 18. Proof of service of petition for review filed by General Counsel.

Apr. 7. Præcipe with proof of service thereon filed by General Counsel.

[fol. 3] BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

PETITION—Filed February 20, 1934

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (IT:AR:B-3) dated December 28, 1933, and as a basis of its proceeding alleges as follows:

(a) The petitioner is a corporation organized under the laws of the Commonwealth of Massachusetts and is the fiduciary named in a deed of trust made by Paul Wilde Jackson the 19th July, 1922. The principal office of the petitioner is located at 17 Court Street, Boston, Massachusetts.

(b) The notice of the deficiency (a copy of which is attached and marked "Exhibit A") was mailed to the petitioner on the 28th December, 1933.

(c) The taxes in controversy are income taxes for the calendar year 1931 and for $21,589.91.

(d) The determination set forth in the said notice of deficiency is based upon the following errors:

1. Including as taxable income for the year 1931 of the taxpayer amounts of income paid to annuitants in the year 1931 pursuant to the said deed of trust.

2. Including as taxable income of the taxpayer for the year 1931, amounts of income that, pursuant to the terms of the deed of trust, had been paid or permanently set aside in 1931 for charitable and educational purposes.

(e) The facts relied upon are as follows:

1. The Commissioner in his letter of December 28, 1933, has stated:

"The facts in this case disclose that specified amounts are payable to the annuitants, to be paid either from income or principal.

"When annuities are payable from income or principal, but are payable in any event, such amount is not taxable to [fol. 4] the recipient but is taxable to the trust as an entity.

See the decision of the United States Board of Tax Appeals in the case of Boston Safe Deposit and Trust Company, appearing in Volume 26, page 486."

This case was appealed to the Circuit Court of Appeals in the first circuit [66 Fed. (2d) 179] which sustained the decision of the Board of Tax Appeals. Since that time the case of Helvering v. Pardee, 78 U. S. Sup. Ct. 239, has been decided in which annuities payable from income or principal are decided to be legacies and not deductible from the taxable income of fiduciaries.

The petitioner's case is distinguishable in that the settlor makes it doubtful in section 13 of the deed of trust that the annuities are to be payable from income and principal or only confined to income.

2. The Commissioner in his letter of December 28, 1933, has stated:

"Your contention with respect to the second contention that the balance of the income is set aside for charitable purposes, cannot be conceded as it is not disclosed that payments were made out of income of the taxable year to the charities nor that any portion of the income was credited to any charity. See the decision of the United States Board of Tax Appeals previously referred to." [Boston Safe Deposit and Trust Company, 26 B. T. A. 486.]

3. Paul Wilde Jackson by a deed of trust dated July 19, 1922 conveyed to the taxpayer a large amount of property which, after making certain pecuniary gifts and providing for certain annuities, contained the following provisions:

"13. I authorize my said trustees to pay to charities as hereinafter described such sums as in their judgment may be paid without jeopardizing the annuities herein provided for, whenever for a period of one year the trust fund held by them as then invested shall have yielded a net income equal to twice the amount of the annuities which they are then required to pay, and upon the death of the survivor of those persons, who under the terms of this instrument are to receive annual incomes under the trust hereby created, [fol. 5] I direct my said trustees to distribute the rest and residue remaining in their hands among corporations and trustees organized, operating and holding exclusively for

religious, charitable, scientific, literary or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, the sum paid over by said trustees to such corporations or boards of trustees to be held by such corporations and boards of trustees in trust, and the income thereof to be expended for the general purposes for which such corporations and boards of trustees are organized, and I request that said funds be designated by each corporation or board of trustees as the Henry Clay Jackson Fund.

"14. I direct the trustees herein named to confine their selection of charities to those organized and administered by Protestants upon non-sectarian lines, not intending hereby to exclude a charity which has upon its board of management persons of other religious beliefs, but meaning and intending to exclude any charity controlled by persons of any race or religion which is non-Protestant and which is designed in the main to serve non-Protestants.

"I further direct that in selecting they give the preference to colleges for women, to homes for aged persons, and to hospitals for deformed and crippled children, the amount to be given to each to be determined by said trustees, but in accordance with the wish of my said brother I direct that they give to a considerable number of charities and that they endeavor to select such as will be likely to conserve the property given to them and to make the income thereof benefit a large number of persons.

"I direct that in making their selection they procure such advice as they may deem desirable, and that in the case of payments during my lifetime or that of my wife and daughter herein named they confer with me or with my said wife and daughter before making a gift to a charity, but subject to the directions hereinbefore set forth I give to them the final decision as to what corporations and boards of trustees shall receive the rest, residue and remainder of [fol. 6] the property transferred to them.

"I authorize the trustees hereunder in case they shall deem it wise so to do to organize new charities, to endow them, and to erect buildings for their use. I also authorize them if in their judgment it is wise so to do to erect buildings for existing colleges and educational institutions, for homes for aged persons, or for hospitals for deformed and crippled children."

4. The petitioner always maintained with respect to the trust funds a principal account and an income account and for the year 1931 the following are the facts:

a. The income account on January 1, 1931, amounted to $187,999.43.

b. The income for the year 1931 amounted to $114,417.36.

c. The annuities paid in 1931 amounted to $22,350.02. These annuities are by the terms of the deed of trust fixed in amount.

d. The payments to charities in 1931 were as follows:

Aug. 12, 1931, House of the Good Samaritan	$25,000
Sept. 3, 1931, House of the Good Samaritan	25,000
Sept. 12, 1931, Boston Floating Hospital	30,000
Nov. 9, 1931, House of the Good Samaritan	25,000
Dec. 16, 1931, Family Welfare Society of Boston	50,000
Dec. 16, 1931, Boston Provident Association	20,000
Dec. 16, 1931, Morgan Memorial	10,000
Dec. 16, 1931, Industrial Aid Society	5,000
Total	$190,000

The foregoing charities are of the kind referred to in the Revenue Act of 1928, Section 162 (a).

e. The income account on January 1, 1932, amounted to $89,553.89.

f. The petitioner, by vote of its trust committee passed November 1, 1929, appropriated not in excess of $200,000 for the erection of a building for the Boston Floating Hos- [fol. 7] pital, a charity of the kind referred to in the Revenue Act of 1928, Section 162 (a), and from time to time the petitioner paid to the Boston Floating Hospital from the accumulated income in satisfaction of the said appropriation $180,000 including $30,000 paid September 12, 1931. There remained thereafter and was paid $17,242.21 of this appropriation for completion of the building. A copy of the said vote of the trust committee is hereto attached marked "Exhibit 1".

g. The petitioner from time to time made payments to charities from the said trust and these payments were always appropriated from the income of the trust premises.

A copy of the income available June 2, 1931, together with the appropriation thereof and dates of the payments of the appropriations including $20,000 appropriated to the Salvation Army in 1931, which was not in fact paid until January 20, 1932, is hereto attached marked "Exhibit 2". The Salvation Army is a charity of the kind referred to in the Revenue Act of 1928, Section 162 (a).

h. The principal of the trust fund as shown on the books of the petitioner on January 1, 1931 amounted to $1,922,-702.51 and on January 1, 1932 amounted to $1,989,043.50. The trust fund was transferred to the petitioner May 29, 1923, on which date the principal and income accounts were opened and the first income was received June 20, 1923. The income of the trust fund since such transfer has been more than sufficient to pay the annuities and the annuities have been paid from such income.

i. The petitioner is informed and believes that the youngest person who received an annuity in 1931 was over sixty-five years of age and the oldest person was over seventy-five years of age.

5. The petitioner was authorized by section 13 of the deed of trust, to pay in the year 1931 to the charities described therein (which are the kind of charities referred to in the [fol. 8] Revenue Act of 1928, Section 162 (a)), all of the net income that was not used in paying the small amount needed for the annuities and, whether paid or not, the annuitants could not have compelled the petitioner to retain such income to be held as a fund to secure the payment of their annuities.

6. The petitioner was authorized by section 13 of the deed of trust, to pay in the year 1931 to the said charities the amount represented by the gains from the sale of securities in 1931 amounting to $61,481.32 and the annuitants could not have compelled the petitioner to retain the said amount represented by gains as a fund to secure the payment of their annuities.

7. Section 162 (a) of the Revenue Act of 1931 provides in respect of taxable income of a fiduciary:

"(a) There shall be allowed as a deduction (in lieu of the deduction for charitable and so forth contributions au-

thorized by section 23 (n)) any part of the gross income, without limitation, which pursuant to the terms of the will or deed creating the trust, is during the taxable year paid or permanently set aside for the purposes and in the manner specified in section 23 (n), or is to be used exclusively for religious, charitable, scientific, literary or educational purposes, or for the prevention of cruelty to children or animals, * * *"

The deed of trust defines the charities in section 13 to which payments may be made as—

"corporations or trustees organized, operating and holding exclusively for religious, charitable, scientific, literary or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, * * *"

And in section 14 limits the kind of charities within the above classification.

8. "Taxation is an intensely practical matter."
Farmers Loan & Trust Co. v. Minnesota, 280 U. S. 204, 212.
[fol. 9] City Bank Farmers Trust Co. v. United States, decided January 30, 1934, by the Supreme Court.

"The statutes imposing taxes are estimated by practical results more than legal fictions."
City Bank Farmers Trust Co. v. United States (supra).
Nichols v. Coolidge, 274 U. S. 531, 541.
Tyler v. United States, 281 U. S. 497, 503.
Lawrence v. State Tax Commission, 286 U. S. 276, 286.

There is no irrefutable presumption that the income and gains for 1931 in excess of the annuity payments may be needed to pay annuities in the future years.
United States v. Provident Trust Company, decided February 5, 1934, by the Supreme Court.
City Bank Farmers Trust Co. v. United States (supra).
Ithaca Trust Co., Executor, v. United States, 279 U. S. 151.

The practical aspect in this case is that if the facts of human experience count for anything, the amounts of income in the year 1931 in excess of the annuity payments and the gains for that year are without limitation permanently set

aside to be used exclusively for the charitable purposes set forth in the Revenue Act of 1928, Section 162 (a). By the end of the year 1933 all of the income in excess of the annuities of the years 1931, 1932 and 1933 had in fact been paid out to such charities.

Wherefore the petitioner prays that this Board may hear the proceeding and determine:

1. That the payments of the annuities are in the nature of payments from the income of the trust fund and are deductible in determining the taxable income of the petitioner for the year 1931; and

2. That all net income of the year in excess of the amount necessary to pay the annuities and all taxable income resulting from gains made in the year 1931 are deductible in determining the taxable income of the petitioner for the [fol. 10] year 1931 pursuant to the terms of Section 162 (a) of the Revenue Act of 1928.

Francis V. Barstow, Counsel for Petitioner, 53 State Street, Boston, Mass.

Duly sworn to by E. L. Swett. Jurat omitted in printing.

EXHIBIT "A" TO PETITION

Treasury Department

Office of Commissioner of Internal Revenue

Washington, Dec. 28, 1933.

Old Colony Trust Company, Trustee, Trust u/d Paul Wilde Jackson (T-1031), 17 Court Street Boston, Massachusetts

SIRS:

You are advised that the determination of your income tax liability for the year(s) 1931 discloses a deficiency of $21,589.91 as shown in the statement attached.

In accordance with section 272 of the Revenue Act of 1928, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter, you may petition the United States Board of Tax Appeals for a redetermination of the deficiency.

However, if you do not desire to petition, you are re- [fol. 11] quested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing of this form will expedite the closing of your return(s) by permitting an early assessment of any deficiency and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier; whereas if this form is not filed, interest at the rate of 6% per annum will accumulate.

Respectfully, Guy T. Helvering, Commissioner, by Chas. T. Russell Deputy Commissioner.

Enclosures: Statement. Form 870. Schedule.

Statement

IT:AR:B-3. DPS-60D.

In re: Old Colony Trust Company, Trustee, Trust u/d Paul Wilde Jackson (T-1031), 17 Court, Street, Boston, Massachusetts

Income Tax Liability

Year	Tax Liability Income	Tax Assessed Income	Deficiency
1931	$21,589.91	None	$21,589.91

Reference is made to the report prepared by Revenue Agent M. E. Lynch, and transmitted to you under date of August 28, 1933, to your protest subscribed to under date of September 13, 1933, and to report on conference held in the office of the internal revenue agent in charge at Boston, Massachusetts, on October 9, 1933.

Careful consideration has been accorded your protest and reference is made to office letter dated November 25, 1933, in which you were advised of the approval of the report.

The only issues presented at conference held in the office of the internal revenue agent in charge were the taxability by the trust of amounts paid to annuitants and whether the income of the trust has been permanently set aside for charitable and educational purposes.

The facts in the case disclose that specified amounts are payable to the annuitants, to be paid either from income or principal.

[fol. 12] When annuities are payable from income or principal, but are payable in any event, such amount is not taxable to the recipient but is taxable to the trust as an entity. See the decision of the United States Board of Tax Appeals in the case of the Boston Safe Deposit and Trust Company, appearing in Volume 26, page 486.

Your contention with respect to the second contention that the balance of income is set aside for charitable purposes, cannot be conceded as it is not disclosed that payments were made out of income of the taxable year to the charities nor that any portion of the income was credited to any charity. See the decision of the United States Board of Tax Appeals, previously referred to.

Since it is stated in a letter dated December 7, 1933, from your representative, Mr. Francis V. Barstow, that you do not desire a hearing in Washington although you do not agree to the proposed adjustments, it is necessary at this time to issue this formal notice of deficiency.

Net income reported on return		$ None
Additions:		
1. Increase in income from fiduciary	$9,885.65	
2. Elimination of loss on sale of securities	1,409.25	
3. Increase in dividends	11,248.01	
4. Elimination of other deductions	80,315.16	102,858.07
Net income as adjusted		$102,858.07
5. Capital net gain as adjusted		61,481.32
Total income as adjusted		$164,339.39

The income of $164,339.39 represents the entire income as adjusted on Fiduciary return Form 1041, which is held to be the taxable income of the trust due to including distribution to annuitants and the elimination of amounts claimed to have been set aside for charitable and educational purposes.

Net income as reflected on fiduciary return has been increased from $151,669.39 to $164,339.39 due to a reduction in the loss from the sale of securities and an increase in the amount of the capital net gain as shown in the accompanying schedule.

[fols. 13-14] Net income as adjusted		$164,339.39
Less:		
Capital net gain		61,481.32
Income subject to surtax		$102,858.07
Less:		
Dividends	$53,583.53	
Personal exemption and credit for dependents	1,500.00	55,083.53
Balance subject to normal tax		$47,774.54
Normal tax at 1½% on $4,000.00	$60.00	
Normal tax at 3% on $4,000.00	120.00	
Normal tax at 5% on $39,774.54	1,988.73	
Surtax on $100,000.00 $11,660.00		
Surtax on $2,858.07 at 20% 571.61	12,231.61	
Tax at 12½% on capital net gain of $61,481.32	7,685.17	
		$22,085.51
Less tax paid at source		495.60
Total tax assessable		$21,589.91
Tax previously assessed		None
Deficiency in tax		$21,589.91

(Here follows Paster Table, folios 15 and 16)

[fols. 15-16]
IT:AR:B-3. DPS.
Old Colony Trust Company, Trustee (T-1031)
Trust u/d Paul Wilde Jackson (1041)

Sales of Securities

		Date Acquired	Date of Sale	Proceeds of Sale	Basis Reported	Profit or (Loss) as reported		Basis as Corrected	Increase or (decrease) in basis	Profit or (Loss) as corrected
330 shares Boston Elevated Ry. Co. 2nd Pfd	(1)	10/1/23	1/13/31	$28,960 80)			97½	$32,175 00)		($3,214 20)
70 " " " " " " "	(1)	"	1/15/31	6,178 20)	$39,200 00	($4,061 00)	97½	6,825 00)	($ 200 00)	(646 80)
184 shares Atchison, Top. & San Fe. Pfd	(1)	"	1/16/31	19,015 64	16,169 00	2,846 64	87 15/16	16,180 50	11 50	2,835 14
500 shares U. S. Steel Pfd	(1)	"	1/20/31	72,855 00	55,687 50	17,167 50	117 15/16	58,968 75	3,281 25	13,886 25
$1 M Atchison, Top. & Santa Fe Adj. 4s-1995	(1)	"	2/13/31	988 75	876 25	112 50	78½	782 50	(93 75)	206 25
$9 M " " " " " Gen. 4s-1995	(1)	"	2/13/31	8,595 00	7,065 00	1,530 60	87½	7,875 00	810 00	720 00
14 shares Island Creek Coal Co. Pfd	(1)	7/19/24	2/4/31	1,466 46	1,337 00	129 46	92	1,288 00	(49 00)	178 46
$15 M South Utah Mines & Smelters 6%	(1)	6/9/24	3/4/31	1,240 65	1	1,239 65		1 00		1,239 65
100 shares Standard Oil Co. of N. Y	(3)	12/23/29	3/28/31	2,211 50	3,287 50	(1,076 00)		3,287 50		(1,076 00)
200 " " " " N. J	(3)	1/29/31	"	9,193 00	9,630 00	(437 00)		9,630 00		(437 00)
500 Rights Public Serv. Corp. of N. J			4/1/31	3 44		3 44				3 44
450 shares National Lead Co. Com	(2)	10/1/23	4/3/31	53,944 50	34,875 00)	19,069 50		(		
150 " " " " Class B Pfd	(2)	6/11/27	4/3/31	17,675 25	16,050 00)	1,625 25		(35,362 50	(15,562 50)	36,257 25
178 " " " " Class A Pfd	(2)	10/1/23	4/3/31	24,890 63	19,758 00	5,132 63		19,980 50	222 50	4,910 13
100 shares U. S. Envelope Co. Pfd	(2)	"	4/18/31	12,150 00	11,990 00	160 00	109	10,900 00	(1,090 00)	1,250 00
$22 M Kingdom of Norway 6's, 1943		2/7/24	6/26/31	23,265 00	20,725 50	2,539 50		20,725 50		2,539 50
$25 M Kingdom of Sweden 5½s, 1954		2/3/25	7/3/31	26,250 00	24,933 75	1,316 25		24,933 75		1,316 25
$17 M Jersey Central Pr. & Lt. 5½-1945 Called	(3)	1/22/31	8/10/31	17,595 00	17,491 25	103 75		17,491 25		103 75
$16 M People's Gas Lt. & Coke 5s-1976 Called	(3)	9/6/28	8/11/31	16,800 00	15,970 25	829 75		15,970 25		829 75
Totals				$343,278 82	$295,047 00	$48,231 82		$282,377 00	($12,670 00)	$60,901 82
Decrease in basis					(12,670 00)	12,670 00				
Totals as corrected				$343,278 82	$282,377 00	$60,901 82				
(3) Amount allocated to sales of securities held less than 2 years and bonds called				45,799 50	46,379 00	(579 50)				
Amount allocated to Capital Net Gain				$297,479 32	$235,998 00	$61,481 32				

(1) Dates acquired as stated above represent dates on which distribution of securities were made to grantor by administrators of Estate of Henry C. Jackson.
Bases as corrected represent market values on dates of such distributions.
Bases as reported on original return were market values on May 21, 1922, date of death of Henry C. Jackson.
(2) See Exhibit A-1.

National Lead Company

October 1, 1923	400 shares common received by grantor in distribution by administrators of Est. Henry C. Jackson, Market Value 10/1/23 at 117 7/8	$47,150 00
March 9, 1925	100 shares sold	11,787 50
	300 shares balance	$35,362 50
June 11, 1927	150 shares common and 150 shares Class B Pfd. stock dividend	
	450 shares common and 150 shares Class B Pfd	$35,362 50
October 1, 1923	178 shares Class A Pfd. received by grantor in distribution by administrators of Estate of Henry C. Jackson. Market Value 10/1/23 at 112 1/4	$19,980 50

[fol. 17] *Petition.*

EXHIBIT 1 TO PETITION

File Envelope. Received 11/6/29.

T 1031

Voted:—That in exercise of the discretion given Old Colony Trust Company as Trustee under Deed of Trust exeeuted by Paul Wilde Jackson, dated July 19, 1922, the company's officers are hereby authorized to pay over to or for the benefit of the Boston Floating Hospital a sum not in excess of two hundred thousand dollars ($200,000) upon receiving the undertaking of the Trustees of said hospital to apply the same to the erection of a building for the use of the hospital substantially in accordance with the published plans for the proposed new New England Medical Center. In making such payment arrangement shall be made that the building shall be designated as a memorial to Henry Clay Jackson or that, otherwise, it shall be identified with his name and that of his brother Paul Wilde Jackson.

Passed by Tr. Com. 11/17'29. CBH.

[fol. 18]

EXHIBIT 2 TO PETITION

Paul Wilde Jackson Trust Fund
Income Available June 2, 1931, $180,000

Organization	Amount Appropriated	Amount and Date Paid
House of the Good Samaritan Cor. Francis & Binney Sts. Boston, Mass.	A sum not in excess of $75,000. to make an addition to its hospital, with appropriate inscription. (Approved Jan. 30, 1931)	$25,000. August 12, 1931 25,000. Sept. 3, 1931 25,000. Nov. 9, 1931
Industrial Aid Society 35 Chardon Street Boston, Massachusetts.	$5,000. to establish a permanent fund to be known as Henry Clay Jackson Fund income only to be used for general purposes.	5,000. Dec. 16, 1931
Family Welfare Society of Boston 41 Hawkins Street Boston, Mass.	$50,000. to establish a permanent fund to be known as Henry Clay Jackson Fund income only to be used for general purposes.	50,000. Dec. 16, 1931

[fol. 19]

Boston Provident Association 41 Hawkins Street Boston, Mass.	$20,000. to establish a permanent fund to be known as Henry Clay Jackson Fund income only to be used for general purposes.	20,000.	Dec. 16, 1931
The Morgan Memorial Cooperative Industries & Stores, Inc. 89 Shawmut Avenue, Boston, Mass.	$10,000. to establish a permanent fund to be known as Henry Clay Jackson Fund income only to be used for general purposes.	10,000.	Dec. 16, 1931
Salvation Army 8 E. Brookline Street Boston, Mass.	$20,000. to establish a permanent fund to be known as Henry Clay Jackson Fund income only to be used for general purposes.	20,000.	Jan. 20, 1932

Approved Dec. 31, 1931.

Committee (GORDON ABBOTT.
(C. B. HUMPHREY,
(FRANCIS R. HART.

[fol. 20] BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

ANSWER—Filed April 21, 1934

The Commissioner of Internal Revenue, by his attorney, Robert H. Jackson, General Counsel, Bureau of Internal Revenue, for answer to the petition filed in the above-entitled proceeding, admits and denies as follows:

(a) Admits the allegations contained in paragraph (a) of the petition.

(b) Admits the allegations contained in paragraph (b) of the petition.

(c) Admits that the taxes in controversy are income taxes for the calendar year 1931. Denies that the Commissioner erred as alleged in paragraph (d) of the petition, subparagraphs 1 and 2.

(e) 1. Avers that there are no material allegations of fact contained in subparagraph 1 of paragraph (e) of the petition and moves that the same be stricken therefrom. Further answering said subparagraph the Commissioner denies all allegations contained therein.

(e) 2. Avers that there are no material allegations of fact contained in subparagraph 2 of paragraph (e) of the petition and moves that the same be stricken therefrom. Further answering said subparagraph the Commissioner admits the allegations contained therein.

(e) 3. Admits that Paul Wilde Jackson, by a deed of trust, conveyed to the Old Colony Trust Company a large amount of property. Denies all other allegations contained in paragraph (e), subparagraph 3, of the petition.

(e) 4. Denies the allegations contained in paragraph (e), subparagraph 4, of the petition.

(e) 5. Denies the allegations contained in paragraph (e), subparagraph 5, of the petition.

(e) 6. Denies the allegations contained in paragraph (e), subparagraph 6, of the petition.

(e) 7. Avers that there are no allegations of fact con-
[fol. 21] tained in subparagraph 7 of paragraph (e) of the petition and moves that the same be stricken therefrom.

(e) 8. Avers that there are no allegations of fact contained in subparagraph 8 of paragraph (e) of the petition and moves that the same be stricken therefrom.

Denies generally and specifically each and every allegation contained in the petition not hereinabove expressly admitted, qualified or denied.

Wherefore it is prayed that the Board redetermine the correct amount of the deficiency involved in this proceeding to be equal to the amount determined by the Commissioner, viz., $21,589.91.

Robert H. Jackson, General Counsel, Bureau of Internal Revenue. Of Counsel: Edward L. Updike, F. R. Shearer, Special Attorneys, Bureau of Internal Revenue.

BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

MOTION TO AMEND PETITION—Filed November 5, 1934

Now comes the petitioner by its counsel, Francis V. Barstow, and moves that the petition in the above-entitled case be amended by striking out sub-paragraph (d) 2 of the said petition relating to the alleged errors in the Commissioner's notice of deficiency tax and inserting in lieu thereof the following.

(d) 2. Including as taxable income of the taxpayer for the year 1931 amounts of income, including gains from the sale of securities, that pursuant to the terms of the Deed of Trust have, in accordance with the provisions of the Revenue Act of 1928, Section 162 (a), been paid or permanently set aside for the purposes and in the manner specified in section 23 (n) of the said Act or have been used exclusively for religious, charitable, or educational purposes or for the prevention of cruelty to children.

Francis V. Barstow, Counsel for the Petitioner.

Dated October 29, 1934.

[fol. 22] I consent to the allowance of the foregoing motion.

Commissioner of Internal Revenue.

Granted November 6, 1934.

Eugene Black, Member United States Board of Tax Appeals.

BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

ANSWER TO AMENDMENT TO PETITION—Filed November 15, 1934

Now comes the respondent, by his attorney, Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue, and for answer to amendment to petition of the above-named taxpayer admits and denies as follows:

(d) 2. Denies the allegations of paragraph (d) 2 of the amendment to petition.

Denies generally each and every allegation of the amendment to the petition not hereinbefore specifically denied.

Wherefore it is prayed that the petition as amended be denied.

Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue. Of Counsel: Hartford Allen, Special Attorney, Bureau of Internal Revenue.

BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

STIPULATION OF FACTS—Filed at Hearing November 21, 1934

It is hereby stipulated and agreed by and between the parties hereto, by and through their respective attorneys of record, that the following correct statement of facts may be offered in evidence in the above-entitled proceeding,

subject to the right of either party to object to the materiality or relevancy of any of the facts so stipulated.

[fol. 23] 1. Paul Wilde Jackson of Braintree, Massachusetts, by an instrument dated July 19, 1922, established a living trust and named as trustees therein the Old Colony Trust Company, a Massachusetts corporation, and George E. Brock of Boston, Massachusetts. George E. Brock died June 10, 1923, and the Old Colony Trust Company has, since the death of Mr. Brock, been the surviving trustee. A copy of the trust instrument is attached hereto marked "Exhibit A".

2. The taxpayer filed a fiduciary return of income upon Form 1041 for the calendar year 1931 with the Collector of Internal Revenue at Boston, Massachusetts. The said return showed net income of $151,669.39, all of which, except the income from gains, was apportioned to annuitants and to the taxpayer. The income from gains was allocated to the taxpayer as an addition to the principal of the trust. An abstract of the return showing all items (other than those marked "None") and all schedules (other than those marked "None") is hereto annexed marked "Exhibit B".

3. The taxpayer filed an individual income tax return upon Form 1040 for the calendar year 1931 with the Collector of Internal Revenue at Boston, Massachusetts, in which return there was disclosed a total income of $80,315.16 and a deduction of a similar amount as "Set aside for Charitable and Educational Purposes". It also showed in Schedule D that capital gains of $49,641.07 were "Set aside for Charitable and Educational Purposes". An abstract of the return showing all items (other than those marked "None") and all schedules (other than those marked "None") is hereto annexed marked "Exhibit C".

4. The revenue agent who examined the returns and the books of the taxpayer made the following changes:

(a) Increased the net income to $164,339.39 (a change to which the taxpayer agrees), said figure including $60,901.82 net profit realized from the sale of securities.

(b) Allocated all of the taxable income to the taxpayer.

(c) Permitted the taxpayer no deductions for income distributed to annuitants or for the income which the taxpayer

claimed was set aside for charitable and educational purposes.

[fol. 24] (d) Computed a deficiency tax of $21,589.91 upon the entire net income as payable by the taxpayer.

(e) Set forth as Exhibit B a summary of the income of the trust exclusive of profits on sales of securities for the year 1931 as disclosed by the income cash records of the trust kept by the taxpayer which the taxpayer agrees is accurate. A copy of the said Exhibit B is hereto annexed marked "Exhibit D".

5. Over protests timely made by the taxpayer, the Commissioner of Internal Revenue approved the revenue agent's report, determined the deficiency tax in accordance therewith and notified the taxpayer by letter dated December 28, 1933, a copy of which appears as Exhibit A to the taxpayer's petition.

6. The first receipt of principal by the taxpayer under the trust was on May 29, 1923, and upon that date separate ledger sheets for the principal, and for the income (exclusive of profits from sales of corpus) of the trust were opened. The first receipt of income was on June 30, 1923. The principal (corpus) account has always been maintained separate and apart from the income account. No annuity payment or payments to charitable organizations have been charged on the books to the principal account, which account includes accumulated profits from sales of securities.

7. The amount of income of the trust for each year since the taxpayer has held the principal has been more than twice the aggregate of the annuity payments required in such year by the terms of the trust and the taxpayer considered that it had power to pay to charities defined in the trust instrument such parts of the principal and income of the trust as in its judgment could be paid without jeopardizing the annuities, except that during the life of the grantor or his wife and daughter the trustee was obliged to confer with the grantor or his wife and daughter before making a gift to charity. The grantor died June 21, 1928, his wife June 30, 1928, and his daughter October 26, 1923.

8. The taxpayer considered that it had power to make gifts from the principal and income of the trust to charities

and it also has considered that all of the trust properties in excess of that part of the income which it considered necessary for the trust expenses and annuity payments be- [fol. 25] longed to charities. Since 1925 it has appropriated and/or paid certain sums to specific charities as hereinafter set forth. The grantor while living approved such gifts. The year, income (exclusive of profits) available, as computed by the taxpayer, appropriations, number of charities and the years in which payments were made, as shown by the records of the taxpayer, are as follows:

Year	Income Available	Amount Appropriated		Number of Charities		Year of Payment
1925 To April 16,	$60,000	$60,000		12		1925
1926 To June 11,	109,000	109,000		3		1926
1927 To June 2,	119,000	0		0		0
1928 To June 2,	214,000	100,000		1		1928
1929 To June 2,	201,000	200,000		1	$150,000	1930
					30,000	1931
					17,242.21	1932
1930 To June 2,	90,000	0		0		0
1931 To June 2,	180,000	180,000		6	160,000	1931
					20,000	1932
1932 To Dec. 31,	113,000	110,000	May 6, 1933	6		1933
1933 To Dec. 28,	60,000	60,000		2		1933

The cash income account, which did not include profits of $60,901.82 from the sales of securities, as maintained by the taxpayer disclosed an unexpended cash balance on December 31, 1931, of $89,553.99. The detailed items of said account are hereinafter set forth. Copies of the votes of appropriations and formal approval of appropriations by the taxpayer to charities are hereto annexed marked "Exhibit E".

9. The fiscal years for determining the amounts which the taxpayer considered to be surplus income available for charities ended June 2d of each year. In the year 1932 this was changed to the calendar year basis.

10. The receipts for the year 1931, exclusive of profits on sales of securities up to and including June 2, 1931, amounted to $60,646.25 and the disbursements for expenses and annuities amounted to $10,148.35, leaving a balance of $50,497.90, and from June 2, 1931, up to and including December 31, 1931, amounted to $57,391.86, and the disbursements for expenses and annuities amounted to $22,-605.16, leaving a balance of $34,786.70.

[fol. 26] 11. The Boston Floating Hospital, to which $30,-000 credited in the trust fund income account was paid in

1931, and the House of The Good Samaritan, the Industrial Aid Society, the Family Welfare Society of Boston, the Boston Provident Association and the Morgan Memorial Cooperative, to which in the aggregate $160,000 credited in the trust fund income account was appropriated and paid in 1931, and the Salvation Army, to which $20,000 credited in the trust fund income account was appropriated in 1931 and paid in January, 1932, are the kind of charities referred to in Section 162 (a) of the Revenue Act of 1928.

12. The Children's Hospital, the Community Health Association, the Family Welfare Society of Boston, the New England Home for Little Wanderers and the Massachusetts Society for Prevention of Cruelty to Children, all of Boston, Massachusetts, and the Convalescent Home of the Children's Hospital of Wellesley, Massachusetts, to which in the aggregate $110,000 credited in the trust fund income account was appropriated and paid in May 1933, are the kind of charities referred to in Section 162 (a) of the Revenue Act of 1928.

13. The book value of the principal of the trust was $1,922,702.51 on January 1, 1931, and $1,989,043.50 on January 1, 1932. The market value of the securities and cash in the principal of the trust on January 2, 1931, was $2,119,835.81 and on December 31, 1931, was $1,488,140.43. The trust funds were invested in ninety-one different kinds of securities and $37,045.18 cash on January 2, 1931, and in ninety different kinds of securities and $230.30 cash on December 31, 1931. No part of the trust funds was invested in real estate and almost all of the securities were readily marketable. The total income received (exclusive of profits on sales of securities) or debits to the taxpayer in 1931 (including coupons due in 1931 but taken into the account in 1930 and excluding coupons due in 1932 and taken into the account in 1931) as shown by the income cash sheets of the trust kept by the taxpayer was $118,038.11 and the total payments, or credits to the taxpayer, exclusive of payments to charities, as shown from the said sheets was $32,753.51. [fol. 27] 14. The total annuities distributed or distributable in 1931 and the ages of the annuitants were as follows:

Annuitant	Age	Annuity
Selina H. Butler	54	$3,600
Alice E. Butler	62	1,500
Edgar Jason Ames	73	1,300
Claribel M. Waterman	63	1,000
Mary Smith	65	1,000
Annie Marston	74	1,000
Mary J. Kendal	85	2,000
Frederick H. Jackson	59	10,000
Harriet E. Butler	55	1,500
Total		$22,900

15. About the time the taxpayer appropriated the first sums to charities it requested an opinion from Arthur T. Johnson, Esq., the attorney who drafted the Paul Wilde Jackson trust, regarding the meaning of Sections 13 and 14 of the trust indenture and received from Mr. Johnson an opinion dated May 14, 1925. A copy of the said opinion is hereto annexed marked "Exhibit F".

16. Prior to January 1, 1931, there had been set aside the $300,000 referred to in Section 2 of the indenture of trust and also prior to the said date the taxpayer had paid the pecuniary gifts referred to in Sections 3, 4, 5 and 12 of the said indenture of trust and on January 1, 1931, the only payments to be made from the trust premises, in addition to the expenses of the taxpayer in managing the trust, including in such expenses its commission, were the annuities referred to in Sections 5, 6, 7, 8, 9, 10 and 11 and the gifts to charities referred to in Section 13 of the said indenture of trust.

17. The cost of purchasing annuities for all of the annuitants of 1931 at their ages in that year if purchased during the first six months of 1931 from The New York Life Insurance Company would have been $220,804.33.

18. In estimating the $180,000 income which the taxpayer considered to be available for charities June 2, 1931, the taxpayer took the total income upon that date as shown [fol. 28] upon its income cash sheet (which excludes profits on sales of securities), deducted $50,000 which represented the unpaid portion of $200,000 appropriated to the Boston Floating Hospital in 1929 and also deducted its commis-

sion to be charged against the income which had not already been paid and a reserve for taxes. The taxpayer's commissions and the reserve for taxes were deducted in other years in estimating the income which the taxpayer considered to be available for charities.

19. The taxpayer's returns were made upon a cash receipts and disbursements basis.

Francis V. Barstow, Attorney for the Petitioner.
Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue.

EXHIBIT "A" TO STIPULATION

(T1031 T1031A T1031B T1031C)

Deed of Trust—Paul Wilde Jackson

Know all Men by these Presents, That whereas my brother, Henry Clay Jackson, late of Boston in the Commonwealth of Massachusetts, deceased, was prevented by death from executing a will, the provisions of which had been determined upon by him, I, Paul Wilde Jackson, of Braintree in said Commonwealth, for the purpose of substantially carrying out the wishes of my said brother, do hereby give, grant, assign, transfer and deliver unto George E. Brock, of said Boston, and the Old Colony Trust Company, a banking corporation having its usual place of business in said Boston, all the right, title and interest which I as the sole heir of my said brother have or may hereafter have in and to that portion of the property of which he died seized and possessed which remains after his debts, funeral charges and expenses of administration including taxes have been paid, except the right to the sum of seventy-five thousand (75,000) dollars, which sum I reserve for myself, the said George E. Brock and the said Old Colony Trust Company to have and to hold the property which [fol. 29] they receive, together with its accumulations in trust for the following uses and purposes:

Whenever the estate of my said brother shall be distributed and the administrators thereof, who are the same persons herein named as trustees, shall take title thereto as trustees, I direct that they —

1. Expend from time to time such sums as in their judgment are required for the care and maintenance of the mausoleum of my said brother situated in Forest Hills Cemetery in said Boston, and if at any time it shall seem wise to them to set up a fund, the income of which will provide for the perpetual maintenance and repair of said mausoleum and the care of its lot, or to make payment of a lump sum to the Proprietors of said Cemetery, in return for a binding agreement to perpetually maintain and repair said mausoleum and care for said lot, then they are authorized to set up such fund or to make such payment.

2. Set apart for me the sum of three hundred thousand (300,000) dollars, and hold, manage and invest said sum for me during my lifetime and pay to me from time to time upon my written orders the whole or any part thereof, and if I shall die before my said trustees receive the property hereby transferred to them then I direct that they distribute said sum in accordance with the directions contained in my last will, and if I shall be living at the time when they receive said sum then I direct that at my death they distribute the balance remaining in their hands in accordance with the directions which may be contained in my last will; and if I am not living at the time when they receive said sum and fail to make provision by will for its distribution then I direct that they set said sum apart and hold, manage and invest it for my wife, Matilda Adelaide Jackson, if she survives me, and that they pay over to her during her lifetime upon her written order such sums as she may from time to time direct, and, at her death distribute the balance then remaining in their hands in accordance with the directions contained in her last will, and if my said wife does not survive me and I fail to make a will or make provision therein for the distribution of said balance, or if my said wife surviving me does not leave a will or make provision therein for the distribution of the balance remaining at the time of [fol. 30] her death, then I direct that the balance remaining at my death or at my wife's death, as the case may be, be distributed by said trustees in accordance with the provisions of the statutes of the Commonwealth of Massachusetts which apply in the event of intestacy.

3. Pay over to—

(a) The Boston Young Men's Christian Association in said Boston the sum of twenty thousand (20,000) dollars,

to be known as the Henry Clay Jackson Fund, the income thereof to be expended for the general purposes of said corporation.

(b) To the Massachusetts Society for the Prevention of Cruelty to Animals in said Boston the sum of five thousand (5000) dollars to be known as the Henry Clay Jackson Fund, the income thereof to be expended for the general purposes of the Society.

(c) To the Home for Aged Men on West Springfield Street in said Boston the sum of ten thousand (10,000) dollars, to be known as the Henry Clay Jackson Fund, the income thereof to be expended for its general purposes.

(d) To the Brockton City Hospital so called, in the City of Brockton in said Commonwealth, the sum of twenty-five thousand (25,000) dollars, to be known as the Henry Clay Jackson and Paul Wilde Jackson Fund, the income thereof to be expended by it for its general purposes.

(e) To the Brockton Young Men's Christian Association in said City of Brockton the sum of ten thousand (10,000) dollars to be known as the Henry Clay Jackson and Paul Wilde Jackson Fund, the income thereof to be expended by it for its general purposes.

(f) To the Free Hospital for Women in Brookline the sum of ten thousand (10,000) dollars, to be known as the Henry Clay Jackson and Paul Wilde Jackson Fund, the income thereof to be expended by it for its general purposes.

4. Pay over to the following persons who are relatives of our deceased mother, Lucy Wilde Jackson, the following sums free and discharged from all trusts, to wit—

(a) To Avis Ann Thayer the sum of two thousand (2000) dollars.

(b) To Elmer Thayer the sum of two thousand (2000) dollars.

[fol. 31] (c) To Susan Ellen Carlton the sum of two thousand (2000) dolllars.

(d) To George Tenney Wilde the sum of one thousand (1000) dollars.

5. In case Selina Henrietta Butler for many years in the employ of my said brother, agrees to and does accept the

gift made to her in this paragraph as being in full payment and satisfaction of all claims against his estate and against the administrators thereof, then I direct said trustees to pay to her the sum of fifty thousand (50,000) dollars outright, that is, free and discharged of all trusts, as soon as they receive sufficient moneys to enable them so to do, and in addition thereto I direct them to pay to her during her lifetime the sum of thirty-six hundred (3600) dollars per annum.

And if the said Selina Henrietta Butler accepts the provisions of the preceding paragraph then I direct said trustees to pay to her sister Alice Eliza Butler the sum of fifteen hundred (1500) dollars per annum during her lifetime; and also in said event to pay to their sister, Harriet Elizabeth Butler, now of Croston, near Preston, England, the sum of fifteen hundred (1500) dollars per annum during her lifetime. Neither of these last two named gifts are to take effect unless the said Selina Henrietta Butler accepts the provisions herein made for her. Said annuities to be paid in monthly instalments if the annuitants or either of them so request.

6. To pay to Edgar Jason Ames, who for many years drove and had charge of my brother's horses, the sum of twenty-five (25) dollars per week during his lifetime, payments to be made to him each week.

7. To pay to the children of the brother of the deceased wife of the said Henry Clay Jackson, during their lifetimes, to wit—

(a) To Alice C. Moulton of Newburyport in said Commonwealth, the sum of two thousand (2000) dollars per annum during her lifetime.

(b) To Mrs. Claribel Waterman of said Newburyport the sum of one thousand (1000) dollars per annum during her lifetime.

(c) To Mrs. Mary Smith, the wife of Dr. C. Morton Smith [fol. 32] of said Boston, the sum of one thousand (1000) dollars per annum during her lifetime.

(d) To Mrs. Annie Marston of Cliftondale in said Commonwealth the sum of one thousand (1000) dollars per annum during her lifetime.

8. Pay to Henry W. Kendall, the one-time partner of my deceased brother, during his lifetime, and thereafter to his wife, Mary Josephine Kendall, if she survives him, the sum of two thousand (2000) dollars per annum during her lifetime.

9. Pay to me during my lifetime, and thereafter to my wife, Matilda Adelaide Jackson, during her lifetime, the sum of ten thousand (10,000) dollars per annum, said sum to be net to me or to my said wife, all income and other taxes thereon to be paid by said trustees.

10. Pay to my daughter, Edith Adelaide Holbrook the sum of ten thousand (10,000) dollars per annum during her lifetime, and if her husband, Irvin N. Holbrook survives her, and if my said daughter so directs by her last will then to pay the whole or any part of said sum to her said husband during his lifetime, any taxes which may be assessed upon the amount to be paid to my said daughter or to her husband to be paid by said trustees.

11. To pay over to and hold and invest for my son Frederick Henry Jackson during his lifetime, and after his death to and for his present wife, if she survives him, during her lifetime, but only so long as she may remain unmarried, the sum of ten thousand (10,000) dollars per annum, in the following manner: For a period of five years I direct that there be paid to him or to her if she survives him, the sum of three hundred (300) dollars per month, and thereafter for five years more the sum of six hundred (600) dollars per month, and that the balance of said sum of ten thousand (10,000) dollars per annum remaining after said payments have been made in any year by the said trustees to be held and invested by them for the benefit of my said son or his said wife. After the expiration of the period of ten years I authorize said trustees in their discretion to pay over to him or to his said wife the sum of ten thousand (10,000) dollars in each year, and also the whole or any [fol. 33] part of the sum which they have accumulated in the foregoing manner, and if at the time of the death of the survivor of them said trustees shall hold any sum derived from said annual payments and their accumulations then I direct that said sum be paid to my grandson Paul Frederick Jackson, or if he is not living then to his children; but no portion of any of the sums to be paid to my said son, to his

wife, or to their son is to be capable of anticipation or alienation by any of them, and if any attempt is made to anticipate or alienate it then the entire remaining gift to the person who attempts such alienation is to be forfeited and is to become a part of the fund to be devoted by said trustees to charities as hereinafter set forth; any taxes upon the annuities herein provided for to be paid by said trustees.

12. To set apart for my grandson, Paul Frederick Jackson the sum of five thousand (5000) dollars, to hold the same in trust for him for a period of ten years, to add from time to time to the principal, the net income derived therefrom, and at the expiration of said period to pay over the whole amount then in the hands of said trustees to my said grandson. No part of said gift is to be capable of anticipation or alienation by him, and the whole sum held by my said trustees at the expiration of said period of ten years is to be added by them to the fund which they are to distribute among charities if my said grandson shall have attempted to transfer his interest therein.

13. I authorize my said trustees to pay to charities as hereinafter described such sums as in their judgment may be paid without jeopardizing the annuities herein provided for, whenever for a period of one year the trust fund held by them as then invested shall have yielded a net income equal to twice the amount of the annuities which they are then required to pay, and upon the death of the survivor of those persons, who under the terms of this instrument are to receive annual incomes under the trust hereby created, I direct my said trustees to distribute the rest and residue remaining in their hands among corporations and trustees organized, operating and holding exclusively for religious, charitable, scientific, literary or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, the sum paid over by said [fol. 34] trustees to such corporations or boards of trustees to be held by such corporations and boards of trustees in trust, and the income thereof to be expended for the general purposes for which such corporations and boards of trustees are organized, and I request that said funds be designated by each corporation or board of trustees as the Henry Clay Jackson Fund.

14. I direct the trustees herein named to confine their selection of charities to those organized and administered by Protestants upon non-sectarian lines, not intending hereby to exclude a charity which has upon its board of management persons of other religious beliefs, but meaning and intending to exclude any charity controlled by persons of any race or religion which is non-Protestant and which is designed in the main to serve non-Protestants.

I further direct that in selecting they give the preference to colleges for women, to homes for aged persons, and to hospitals for deformed and crippled children, the amount to be given to each to be determined by said trustees, but in accordance with the wish of my said brother I direct that they give to a considerable number of charities and that they endeavor to select such as will be likely to conserve the property given to them and to make the income thereof benefit a large number of persons.

I direct that in making their selection they procure such advice as they may deem desirable, and that in the case of payments during my lifetime or that of my wife and daughtre herein named they confer with me or with my said wife and daughter before making a gift to a charity, but subject to the directions hereinbefore set forth I give to them the final decision as to what corporations and boards of trustees shall receive the rest, residue and remainder of the property transferred to them.

I authorize the trustees hereunder in case they shall deem it wise so to do to organize new charities, to endow them, and to erect buildings for their use. I also authorize them if in their judgment it is wise so to do to erect buildings for existing colleges and educational institutions, for homes for aged persons, or for hospitals for deformed and crippled children.

15. I authorize my said trustees to sell, invest and rein- [fol. 35] vest any of the property or securities which they may receive from the administrators of said estate, no purchaser to be responsible for the application of the purchase price. I agree to execute any and all instruments that may be required hereafter in order to enable said trustees to receive the property hereby transferred to them.

16. I direct my said trustees to make the annual payments herein provided for at regular intervals, i. e., quarterly or semi-annually in each year except as otherwise provided.

17. I direct my said trustees to do any and all acts necessary in order to carry out the provisions and intent of this trust, and to incur such expense as may be necessary and proper in so doing, and to pay over to themselves regularly during the life of this trust, and at its termination such sums as are reasonable and fair compensation for services rendered by them as trustees.

In witness whereof I hereunto set my hand and seal this nineteenth day of July, 1922.

Paul Wilde Jackson (Seal). In the presence of Roberta S. Roper. Read back by DH, FMC. Assembled by VW.

7/11/33.

We hereby guarantee that the foregoing is a true and correct copy of the original instrument, duly executed, which is in our possession and under our control, and is still in full force and effect.

Old Colony Trust Company, by H. B. Driver, Trust Officer.

EXHIBIT "B" TO STIPULATION

Abstract of Tax Return of Txpayer on Form 1041 for Year 1931

Item.		Income	
2	Interest on Bank Deposits, Notes, etc	$33,189.46	
3	Interest on Tax-free Covenant Bonds upon which a tax was paid at source	24,290.00	
[fol. 36]			
6	Profit from Sale of Real Estate, Stocks, bonds, etc	48,231.82	
7	Dividends on Stock of Domestic Corporations	53,583.53	
	Total		$159,294.81
		Deductions	
11	Taxes Paid	691.79	
15	Other Deductions Authorized by Law	6,933.63	
	Total Deductions		7,625.42
	Net Income		$151,669.39

EXHIBIT "B" TO STIPULATION—Continued

Beneficiaries' Shares of Income and Credits

	Name and Address of Each Beneficiary	Percentage of Beneficial Interest	Dividends	Balance of Net Income	Income Tax Paid at Source
(a)	Mrs. Selina H. Atkinson, Lancashire, Eng	3.29999	$1,768.25	$1,645.18	$16.03
(b)	Frederick H. Jackson	6.59996	3,536.49	3,290.35	32.06
(c)	Miss Alice E. Butler	1.37499	736.77	685.50	6.68
(d)	Miss Harriet E. Butler	1.37499	736.77	685.50	6.68
(e)	Mrs. Mary Smith	.91666	491.18	456.99	4.45
(f)	Edgar Jason Ames	1.19166	638.53	594.09	5.79
(g)	Mrs. Claribel M. Waterman	.91666	491.18	456.99	4.45
(h)	Mrs. Mary J. Kendall	1.83332	982.36	913.98	8.91
(i)	Mrs. Annie Marston	.91666	491.18	456.99	4.45
(j)	Old Colony Tr. Co., Tr. for Charities	79.00846	42,335.52	39,388.89	383.83
(k)	Principal of Tr. T-1031B	2.56665	1,375.30	1,279.58	12.47
(l)	Principal of Tr. Gains	.....	.....	48,231.82	.....
(m)	Totals	.....	$53,583.53	$98,085.86	$485.80

Nontaxable Obligations, etc.

(a) Obligations of a State, Territory, or any political subdivisions thereof, etc $5,653.93

Schedule C—Profit from Sale of Real Estate, Stocks, Bonds, etc.

	Date Acquired	Amount Realized	Cost or Value as of March 1, 1913, etc.	Net Profit
Securities	Various	$343,278.82	$295,047.00	$48,231.82

[fol. 37] EXHIBIT "C" TO STIPULATION

[Figures in italics were in red in original]

Abstract of Tax Return of Taxpayer on Form 1040 for Year 1931

Income

Item.			
6	Income from Fiduciaries—Old Colony Trust Co., Trustee, 17 Court Street, Boston, Mass. T-1031	$39,388.89	
8	Profit from Sales of Real Estate, Stocks, Bonds, etc.	*1,409.25*	
10	Dividends on Stock of Domestic Corporations		42,335.52
	Total Income		$80,315.16

Deductions

18 Other deductions authorized by law	80,315.16	
Total deductions		80,315.16
Net income		None

Computation of Tax

Item	
33. Net Income	$ None
34. Liberty Bond Interest	$ None
35. Dividends	42,335.52
36. Credit for Dependents	None
37. Personal Exemption	1,500.00
38. Total of Items 34 to 73	43,835.52
39. Balance (Item 33 minus 38)	$ None
49. Tax on Capital Gain or Loss	$ None
53. Less Income Tax paid at source	$383.83

Schedule C—Profit from Sale of Real Estate, Stocks, Bonds, etc.

Kind of Property	Date Acquired	Amount Realized	Cost or Value as of March 1, 1913, etc.	Net Profit
Securities	Various	$28,990.50	$30,408.75	*$1,409.25*

[fol. 38] Schedule D—Capital Net Gain or Loss from sale of Assets Held More Than Two Years

Kind of Property	Date Acquired	Date Sold	Amount Realized	Cost or Value as of March 1, 1913, etc.	Net Gain or Loss
Securities	Various	Various	$314,279.32	$264,638.25	$49,641.07

Set Aside for Charitable & Educational Purposes

Schedule E—Interest on Liberty Bonds and Other Obligations, etc.

(a) Obligations of a State, Territory, or any political subdivision thereof, etc.	$ 4,467.11

Schedule F

Set aside for Charitable & Educational Purposes $80,315.16

EXHIBIT "D" TO STIPULATION

Trust u/d Paul Wilde Jackson (1041)

Old Colony Trust Company, Trustee (T-1031)

EXHIBIT B

Summary of Income Account for the Year 1931 as Disclosed by Cash Records of Trust

1/1/31 Balance of cash per records			193,779.43
Deduct:			
Interest coupons due in 1931 which were collected in 1930			5,780.00
Balance representing accumulated income on hand Jan. 1, 1931			187,999.43
Add:			
Taxable income exclusive of profits reported on Form 1041 for the year 1931			
Item 2		$33,189.46	
Item 3		24,290.00	
Item 7		53,583.53	
Total		111,062.99	
[fol. 39] Less:			
Item 11	691.79		
Item 15	6,933.63	7,625.42	103,437.57
Interest on municipal bonds collected			2,237.50
Coupons due in 1931 collected in 1932			5,630.00
Cash received 5/14/31 in final distribution of Estate of Henry C. Jackson, representing income collected by estate in 1930			3,112.29
Total forward			$302,416.79

Deduct:			
Cash payments out of income 1/1/31–12/31/31:			
Edgar J. Jason Ames		$1,300.00	
Alice E. Butler		1,375.00	
Harriet E. Butler		1,375.00	
Selina J. Atkinson		3,300.00	
Frederick H. Jackson		7,200.00	
Trust for benefit of Frederick H. Jackson		2,800.00	
Mary J. A. Kendall		2,000.00	
Annie Marston		1,000.00	
Mary Smith		1,000.00	
Claribel M. Waterman		1,000.00	$22,350.00
Amortization on bonds transferred to principal			456.55
Collector of Internal Revenue			0.69
Accrued interest paid on coupons due in 1932			55.56
*Paid to Charities:			
8/12/31	House of the Good Samaritan	25,000.00	
9/ 3/31	House of the Good Samaritan	25,000.00	
11/ 9/31	House of the Good Samaritan	25,000.00	
9/12/31	Boston Floating Hospital	30,000.00	
12/16/31	Boston Provident Ass'n	20,000.00	
12/16/31	Family Welfare Society	50,000.00	
12/16/31	Morgan Memorial	10,000.00	
12/16/31	Industrial Aid Society	5,000.00	
			212,862.80
1/1/32	Balance of cash on hand		$89,553.99

*Total amount paid to charities $190,000.00

[fol. 40] EXHIBIT "E" TO STIPULATION

Old Colony Trust Company,

Boston, Massachusetts

January 30, 1931.

Alan Cunningham, President Board of Managers House of the Good Samaritan, 100 Arlington Street, Boston.

MY DEAR MR. CUNNINGHAM:

In the exercise of the discretion given it under Deed of Trust dated July 19, 1922, betwen Paul Wilde Jackson and Old Colony Trust Company, the Trust Company is prepared to pay to the House of the Good Samaritan the amount necessary to make the addition to its hospital—not, however, in excess of seventy-five thousand dollars ($75,000)—as set forth in your letter of January 22, 1931, upon receiving proper assurance of the cost involved.

Under the terms of the Trust, we have been advised by counsel that we properly may make payments to charitable corporations not only for the purpose of establishing funds the income of which shall be used for the purposes of the corporation, but that under a broader interpretation we may make such payments to be used by such corporations as capital expenditures, that is, to erect or furnish buildings or parts thereof or to make other permanent additions and improvements to the properties so that the organizations shall have the use of such additions and improvements.

Before making the payment, we request that your Board having authority pass a vote accepting the amount indicated above, to be used for the particular purpose of this addition to your building.

By the terms of the Deed of Trust it is requested that funds "be designated by each corporation or board of trustees as the Henry Clay Jackson Fund". We understand that it will be agreeable to you to mark the new addition with some appropriate inscription, and suggest that at the proper time we agree upon the exact form and wording of such inscription.

Yours very truly, C. B. Humphrey, Vice President.

[fol. 41] File Envelope T1031

Received 11/6/29.

Voted: That in exercise of the discretion given Old Colony Trust Company as Trustee under Deed of Trust executed by Paul Wilde Jackson, dated July 19, 1922 the company's officers are hereby authorized to pay over to or for the benefit of the Boston Floating Hospital a sum not in excess of two hundred thousand dollars ($200,000) upon receiving the undertaking of the Trustees of said hospital to apply the same to the erection of a building for the use of the hospital substantially in accordance with the published plans for the proposed new New England Medical Center. In making such payment arrangement shall be made that the building shall be designated as a memorial to Henry Clay Jackson or that, otherwise, it shall be identified with his name and that of his brother Paul Wilde Jackson.

[fol. 42]

Paul Wilde Jackson Trust Fund

Plan for Distribution of $60,000 Excess Income

Organization	Annual Beneficiaries (approximate)	Payment from Jackson Fund			Purpose
Children's Hospital 300 Longwood Avenue, Boston.	5,000 (plus outside treatments)	$25,000.	P	6-23-25	
New England Peabody Home for Crippled Children, Oak Hill, Newton, Mass.	85	3,000.	P	6-27-25	
Industrial School for Crippled and Deformed Children, 241 St. Botolph St., Boston	114	2,000.	Pd.	6- 9-25	
Boston Home for Incurables, 2049 Dorchester Ave., Dorchester, Mass.	40-50	2,000.	Pd.	7-15-25	
Burnap Free Home for Aged Women, 38 Pleasant Street, Dorchester, Mass.	18	1,000.	Pd.	12-23-25	
Cambridge Homes for Aged People, 360 Mt. Auburn St., Cambridge, Mass.	51	3,000.	Pd.	6-11-25	
Home for Aged Men, 133 W. Springfield St., Boston.	86	3,000.	P	7-10-25	Outside aid
Home for Aged Women, 108 Revere Street, Boston.	85	3,000.	Pd.	11- 6-25	
Home for Aged Couples, Columbus & Walnut Avenues, Roxbury.	76	3,000.	P	8-14-25	
[fol. 43]					
Community Health Association 31 St. James Avenue, Boston.		5,000.	P	6-13-25	
Morgan Memorial Co-operative Industries and Stores, Inc., 89 Shawmut Ave., Boston.	1783 (Outside 1800)	5,000.	P	6-22-25	
Salvation Army of Massachusetts, Inc., 8 East Brookline St., Boston.	244,000 (Outside 66,000)	5,000.	Pd.	6- 9-25	
		$60,000			

Approved Apr. 16, 1925.

Paul W. Jackson,
C. B. Humphrey.

[fol. 44] Plan for Distribution of $109,000 Excess Income

Organization	Payment from Jackson Fund	
Home for Aged Men, 133 West Springfield Street, Boston, Mass.	$37,000. This to be added to the sum of $3,000. paid in 1925, the whole creating a fund of $40,000, of which Income only is to be used for outside aid.	Pd. 6-22-26
Home for Aged Women, 108 Revere Street, Boston, Mass.	$37,000. This to be added to the sum of $3,000. paid in 1925, the whole creating a fund of $40,000, of which Income only is to be used for outside aid.	Pd. 7-1-26
Boston Y. W. (Women's) C. A., 37½ Beacon Street, Boston, Mass.	$35,000. The same to create a Trust Fund to be known as the Henry Clay Jackson Memorial Educational Fund, of which the Income only shall be used for expenses of the Educational Department of the association.	Pd. 6-24-26

Approved: June 11, 1926.
Paul Wilde Jackson,
Old Colony Trust Company,
By C. B. Humphrey.

[fol. 45].

Income Available June 2, 1927 $119,000

Organization	Amount Appropriated	Amount and Date Paid
	None	None

Income Available June 2, 1928 $214,000

Organization	Amount Appropriated	Amount and Date Paid
Children's Hospital 300 Longwood Avenue, Boston	$100,000.00 This is for the purpose of an addition to the Out-Patient and Admissions Department to be marked with an appropriate memorial tablet as the gift of the Henry Clay Jackson Fund.	$100,000.00 Dec. 31, 1928

Approved Dec. 31, 1931

Committee (Gordon Abbott,
(C. B. Humphrey,
(Francis R. Hart.

Note.—Approved on the date indicated to ratify and confirm approval made at an earlier date but not recorded.

[fol. 46]

Income Available June 2, 1929, $201,000

Organization	Amount Appropriated	Amount and Date Paid	
The Boston Floating Hospital 244 Washington Street, Boston, Mass.	A sum not in excess of $200,000 to be applied to the erection of a building for the use of the hospital substantially in accordance with the published plans for the proposed new New England Medical Center; the building to be designated as a memorial to Henry Clay Jackson or to be identified with his name and that of his brother, Paul Wilde Jackson.	$150,000 30,000 17,242.21	November 13, 1930 Sept. 12, 1931 Jan. 20, 1932

Approved, Dec. 31, 1931.

Committee (Gordon Abbott,
(C. B. Humphrey,
(Francis R. Hart.

Note.—Approved on the date indicated to ratify and confirm approval made at an earlier date but not recorded.

[fol. 47]

Income Available June 2, 1931, $180,000

Net after allowing 50M bal. appr. to Bos. Floating Hosp.

Organization	Amount Appropriated	Amount and Date Paid	
House of the Good Samaritan Cor. Francis & Binney Sts. Boston, Mass.	A sum not in excess of $75,000. to make an addition to its hospital with appropriate inscription (approved Jan. 30, 1931)	$25,000. 25,000. 25,000.	August 12, 1931 Sept. 3, 1931 Nov. 9, 1931
Industrial Aid Society 35 Chardon Street Boston, Massachusetts.	$5,000. to establish a permanent fund to be known as Henry Clay Jackson Fund income only to be used for general purposes.	5,000.	Dec. 16, 1931
Family Welfare Society of Boston 41 Hawkins Street Boston, Mass.	$50,000. to establish a permanent fund to be known as Henry Clay Jackson Fund income only to be used for general purposes	50,000.	Dec. 16, 1931
Boston Provident Association 41 Hawkins Street Boston, Mass.	$20,000. to establish a permanent fund to be known as Henry Clay Jackson Fund income only to be used for general purposes	20,000.	Dec. 16, 1931
The Morgan Memorial Cooperative Industries & Stores, Inc. 89 Shawmut Avenue, Boston, Mass.	$10,000. to establish a permanent fund to be known as Henry Clay Jackson Fund income only to be used for general purposes	10,000.	Dec. 16, 1931
[fol. 48] Salvation Army 8 E. Brookline Street Boston, Mass.	$20,000. to establish a permanent fund to be known as Henry Clay Jackson Fund income only to be used for general purposes	20,000.	Jan. 20, 1932.

Approved Dec. 31, 1931

Committee (Gordon Abbott,
(C. B. Humphrey,
(Francis R. Hart.

Income Available December 31, 1932—$113,000

Organization	Amount Appropriated	Amount and Date Paid
The Children's Hospital, 300 Longwood Avenue, Boston, Mass.	$10,000 to be added to permanent fund known as Henry Clay Jackson Fund, income only to be used for general purposes	$10,000.—May 10, 1933
Community Health Association 31 St. James Avenue Boston, Massachusetts	$20,000 to be added to permanent fund known as Henry Clay Jackson Fund, income only to be used for general purposes	$20,000.—May 10, 1933
Family Welfare Society of Boston 41 Hawkins Street Boston, Massachusetts	$40,000 to be added to permanent fund known as Henry Clay Jackson Fund, income only to be used for general purposes	$40,000.—May 10, 1933
[fol. 49] New England Home for Little Wanderers 161 South Huntington Avenue Roxbury, Massachusetts	$15,000 to establish a permanent fund to be known as Henry Clay Jackson Fund, income only to be used for general purposes	$15,000.—May 10, 1933
The Convalescent Home of the Children's Hospital Wellesley, Massachusetts	$15,000 to establish a permanent fund to be known as Henry Clay Jackson Fund, income only to be used for general purposes	$15,000.—May 10, 1933
Massachusetts Society for the Prevention of Cruelty to Children 43 Mount Vernon Street Boston, Massachusetts	$10,000 to establish a permanent fund to be known as Henry Clay Jackson Fund, income only to be used for general purposes	$10,000.—May 10, 1933

Approved May 6th, 1933

Committee (Francis R. Hart,
(Gordon Abbott,
(G. B. Humphrey.

Income Available December 28, 1933—$60,000

Organization	Amount Appropriated	Amount and Date Paid
Peter Bent Brigham Hospital 721 Huntington Avenue Boston, Massachusetts	$530,000 to establish a permanent fund to be known as Henry Clay Jackson Fund, income only to be used for general purposes	$30,000. Dec. 29, 1933
[fol. 50] Massachusetts General Hospital Fruit Street Boston, Massachusetts	$30,000 to establish a permanent fund to be known as Henry Clay Jackson Fund, income only to be used for general purposes	$30,000 Dec. 29, 1933

Approved December 28, 1933.

(Gordon Abbott,
Committee (Francis R. Hart,
(C. B. Humphrey.

fol. 51] EXHIBIT "F" TO STIPULATION

Arthur T. Johnson Counsellor at Law,

Barristers Hall, Pemberton Square, Boston, Mass.

May 14, 1925.

Old Colony Trust Company, 17 Court Street, Boston, Mass.

DEAR SIRS:

In connection with the Deed of Trust created by Paul Wilde Jackson I am of the opinion—

First. That the authority given the Trustees to make payments to charities whenever the net income is equal to twice the amount of the annuities permits them to make payments not only of income but of principal from time to time in the exercise of their judgment.

Second. That the Trustees not only may make payments to charitable corporations for the purpose of establishing funds to be invested in securities and the income used for the purposes of the Corporation, but that, under a broader interpretation, they properly may make such payments to be used by such corporations as capital expenditures, that is, to erect or furnish buildings or parts thereof or to make other permanent additions and improvements to the properties of charitable organizations so that the organizations shall have the use of such additions and improvements. For example: In my opinion your proposed gifts to the Salvation Army for the erection of two dormitories at its fresh air camp in Sharon and to the Home for Aged Couples for the purpose of constructing and equipping with permanent apparatus a hospital room, are within your proper powers under the Trust Deed.

This opinion is elaborated in the memorandum attached, which also contains facts concerning the drafting and execution of the Trust Deed which you may wish to have in your files for reference.

Yours very truly, Arthur T. Johnson.

[fol. 52] Arthur T. Johnson Counsellor at Law

Barristers Hall, Pemberton Square, Boston, Mass.

May 14, 1925.

Old Colony Trust Company, 17 Court Street, Boston, Mass.

Dear Sirs:

I have given consideration to the matters which I discussed recently with Mr. Humphrey, and in accordance with his request submit herewith an opinion relating thereto.

When Henry C. Jackson first talked with me about the matter of a will, he told me that except for certain gifts of lump sums and annuities which are not material to the question now under consideration, he wished to leave all of his property to charities, but he had not come to any conclusion as to particular charities except that he had decided to give various relatively unimportant sums to some or all of the charities which are named in the third clause of the Paul Wilde Jackson Trust. I have several times stated to you that he told me at this conversation that he was particularly interested in colleges for women, that he would like to have founded a college similar to the one which Mr. Simmons founded. He stated "• • • Simmons got ahead of me on this. I would like to have founded a college for young women. He stated that in addition to colleges for women, he was particularly interested in hospitals for children and homes for aged persons. He said that this was as far as he had gotten in working out his plans and that he realized his trustees would have to take it up from this point and carry it forward if he did not live to do it himself.

There was a discussion also of the matter of estate and inheritance taxes, and particularly of federal taxes, and the language in the thirteenth paragraph of the Paul Wilde Jackson Trust—"among corporations and trustees organized, operating and holding exclusively for religious, charitable, scientific, literary or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals"—is practically that of the United States Estate Tax law, (Acts 1921, section 403 B-3). That is, the objects of his charity were described in accordance with the description in the Federal statute, so that there might be no question about the exemption. Congress in en-

[fol. 53] acting this statute meant to exempt any gift to a real charity, and defined charity in the broadest way, and this language was deliberately adopted by me in drafting the will and transferred from the will to the trust.

It seems to me that it is important to have this fact in mind in analyzing clauses 13, 14, etc. and that in considering your powers and duties under them, there are two basic propositions, first, that your trust is an active one, that it calls for construction of a scheme of distribution; the exercise of choice, the selection of charities; and second, that the field from which selection is to be made is as broad as that defined by Congress when it enacted the Estate Tax law.

The word "trustees" following the word "corporation", which does not appear in the federal statute, was introduced by me because I had the feeling that there might be cases where funds were held not by corporations, but by natural persons as trustees.

With this preliminary statement, we come to an analysis of the trust, more particularly clauses 13 and 14.

Mr. Jackson recognized that the annuities, being to natural persons, would cease one by one, and that it would be possible, without jeopardizing the interests of the last survivors, to begin to make payments to charities from principal as well as income before the time arrives for final distribution. He fixed the time and conditions under which the trustees were to have power to do so, i. e., it should be "whenever for a period of one year the trust fund shall have yielded a net income equal to twice the amount of the annuities which they are then required to pay". The first part of clause 13 deals with this matter. By it, the trustees are authorized, that is, empowered, given legal sanction "to pay to charities as hereinafter described", i. e., as described in the language above quoted—"such sums as in their judgment may be paid without jeopardizing", etc. They are not directed to do this. It is left to their judgment whether or not they will make payments to charities before the death of the last annuitant. If they do make such gifts, they are doing it under the authority given them by this clause in anticipation of final distribution, and they are to distribute them in the same manner that the trust requires them to when the time for final distribution arrives.

[fol. 54] In my opinion this part of clause 13 merely gives authority to begin distribution before the time fixed for final

two are not dependent one on the other, and one does not limit the other. The next sentence authorizes the trustees to erect buildings for existing colleges, for homes for the aged, for hospitals for children. Under the first sentence of this paragraph, as above stated, the trustees may build, organize, and endow a new college and by the second sentence power is given to erect a dormitory for instance, for an existing college or a building for an existing hospital. If the Trustee wished to organize an entirely new college, for instance, it would act under the first sentence. If it wished to benefit an existing college, it would act under the second sentence.

I trust that the above covers the ground concerning which you desired my opinion.

Yours very truly, Arthur T. Johnson.

BEFORE UNITED STATES BOARD OF TAX APPEALS

Docket No. 74928

OLD COLONY TRUST COMPANY, Trustee under an Indenture of Trust of Paul Wilde Jackson, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Promulgated October 29, 1935

1. A trustee may not deduct, under section 162 (b) Revenue Act of 1928, amounts paid to annuitants in the taxable year pursuant to a deed of trust by the terms of which the annuities are charges upon both the income and the corpus at any time when payment of them becomes due.

2. Income, consisting of gains from sales of securities, which is added to the corpus, is not permanently set aside for charitable, etc., purposes, within the meaning of section 162 (a), Revenue Act of 1928, where not only the income but the corpus of the trust remaining at any time may be used to pay annuities.

[fol. 57] 3. Where the trustees have on hand at the beginning of the year income accumulated in prior years and also receive income during the taxable year, amounts actually

paid by them to charities pursuant to the terms of the deed of trust may be deducted, in computing the net income of the trust, only to the extent that they are shown by the evidence to have been paid from the gross income of the taxable year.

F. V. Barstow, Esq., for the petitioner.
Hartford Allen, Esq., for the respondent.

OPINION

MURDOCK:

The Commissioner determined a deficiency of $21,589.91 in income tax of the petitioner for the calendar year 1931. The petitioner assigns as error the action of the Commissioner in including as taxable income for 1931, (1) "amounts of income paid to annuitants in the year 1931 pursuant to the said Deed of Trust", and (2) "amounts of income, including gains from the sale of securities, that pursuant to the terms of the Deed of Trust have, in accordance with the provisions of the Revenue Act of 1928, section 162 (a), been paid or permanently set aside for the purposes and in the manner specified in section 23 (n) of the said Act or have been used exclusively for religious, charitable, or educational purposes or for the prevention of cruelty to children."

The facts were stipulated and need not be set forth in full detail.

The petitioner is the surviving trustee of a trust established by Paul Wilde Jackson by a deed dated July 19, 1922. The trust was created for the purpose of carrying out some wishes of the grantor's brother, who died intestate, leaving the grantor as his sole heir. The trust deed placed the property received from the brother in trust and provided for the distribution of a part of it in ways not now material. It then directed the trustees to pay the following amounts to the following persons for life:

Selina Henrietta Butler (for many years an employee of the brother)	$3,600 per annum
Alice Eliza Butler (sister of Selina)	1,000 " "
Harriet Elizabeth Butler (sister of Selina)	1,500 " "
[fol. 58] Edgar Jason Ames (for many years coachman for the brother)	25 per week

Alice C. Moulton (child of a brother-in-law of the brother)	1,000	per annum
Claribel M. Waterman (child of a brother-in-law of the brother)	1,000	" "
Mary Smith (child of a brother-in-law of the brother)	1,000	" "
Annie Marston (child of a brother-in-law of the brother)	1,000	" "
Henry W. Kendall (one-time partner of deceased brother) and after his death to his wife, Mary Josephine Kendall	2,000	" "
Paul Wilde Jackson (the grantor) and after his death to his wife, Matilda Adelaide Jackson	10,000	" "
Edith Adelaide Holbrook (daughter of grantor) and, if she so directs, after her death to her husband, Irvin N. Holbrook	10,000	" "
Frederick Henry Jackson (son of grantor) and after his death to his wife, while she remains unmarried	10,000	" "

It also provided that the trustees were to "set apart" $5000 for a grandson of the grantor and pay it over with accumulations at the end of ten years.

Paragraph 13 of the deed of trust is as follows:

I authorize my said trustees to pay to charities as hereinafter described such sums as in their judgment may be paid without jeopardizing the annuities herein provided for, whenever for a period of one year the trust fund held by them as then invested shall have yielded a net income equal to twice the amount of the annuities which they are then required to pay, and upon the death of the survivor of those persons, who under the terms of this instrument are to receive annual incomes under the trust hereby created, I direct my said trustees to distribute the rest and residue [fol. 59] remaining in their hands among corporations and trustees organized, operating and holding exclusively for religious, charitable, scientific, literary or educational purposes including the encouragement of art and the prevention of cruelty to children or animals, the sum paid over by said trustees to such corporations or boards of trustees to

be held by such corporations and boards of trustees in trust, and the income thereof to be expended for the general purposes for which such corporations and boards of trustees are organized, and I request that said funds be designated by each corporation or board of trustees as the Henry Clay Jackson Fund.

The trustees were also authorized to organize new charities and to build buildings for charities, if they deemed it wise to do so.

The first receipt of principal by the taxpayer under the trust was on May 29, 1923, and upon that date separate ledger sheets for the principal, and for the income (exclusive of profits from sales of corpus) of the trust were opened. The first receipt of income was on June 30, 1923. The principal (corpus) account has always been maintained separate and apart from the income account. No annuity payments or payments to charitable organizations have been charged on the books to the principal account, which account includes accumulated profits from sales of securities.

The amount of income of the trust for each year since the taxpayer has held the principal, has been more than twice the aggregate of the annuity payments required in such year by the terms of the trust and the taxpayer considered that it had power to pay to charities defined in the trust instrument such parts of the principal and income of the trust as in its judgment could be paid without jeopardizing the annuities, except that during the life of the grantor or his wife and daughter the trustee was obliged to confer with the grantor or his wife and daughter before making a gift to charity. The grantor died June 21, 1928, his wife June 30, 1928 and his daughter October 26, 1923.

The taxpayer considered that it had power to make gifts [fol. 60] from the principal and income of the trust to charities and it also has considered that all of the trust properties in excess of that part of the income which it considered necessary for the trust expenses and annuity payments belonged to charities. Since 1925 it has appropriated and/or paid certain sums to specific charities. • • •

The trustees had paid $436,242.21 to charities prior to January 1, 1931. The market value of the trust corpus was

$2,119,835.81 on January 1, 1931, and $1,488,140.43 on December 31, 1931, while the cash balance on those dates was $193,779.43 and $89,553.99, respectively. The accumulated income on hand on January 1, 1931, was $187,999.43. The amounts paid to charities during 1931 and the dates on which the payments were made were:

August 12	$25,000
September 9	25,000
September 12	30,000
November 11	25,000
December 16	85,000
Total	190,000

The $30,000 listed above was in payment of a part of the unpaid balance of an appropriation made in 1929.

The trust received income during 1931 of $60,901.82 from the sale of securities and $114,417.36 from other sources. The Commissioner determined that the net income for the year amounted to $164,339.39. The trustees paid $22,350 to annuitants during the year.

The total annuities distributed or distributable in 1931 and the ages of the annuitants were as follows:

Annuitant	Age	Annuity
Selina H. Butler	54	$3,600
Alice E. Butler	62	1,500
Edgar Jason Ames	73	1,300
Claribel M. Waterman	63	1,000
Mary Smith	65	1,000
[fol. 61] Annie Marston	74	1,000
Mary J. Kendall	85	2,000
Frederick H. Jackson	59	10,000
Harriet E. Butler	55	1,500
Total		$22,900

The cost of purchasing annuities for all of the annuitants of 1931 at their ages in that year if purchased during the first six months of 1931 from The New York Life Insurance Company would have been $200,804.33.

The taxpayer's returns were made upon a cash receipts and disbursements basis.

The petitioner filed a fiduciary return for 1931 showing income apportioned to annuitants and to itself. It also filed an individual return for the year showing total income of $80,315.16 and a deduction of a like amount "Set aside for Charitable and Educational Purposes." Capital gains of $49,641.07 were shown as "Set aside for Charitable and Educational Purposes".

The Commissioner allocated all of the taxable income to the petitioner and allowed no deductions for income distributed to annuitants or set aside for charitable and educational purposes.

The first question for decision is whether the petitioner may deduct from its gross income for tax purposes the amounts distributable to the annuitants in 1931. Section 162 (b) of the Revenue Act of 1928 provides in part as follows:

> There shall be allowed as an additional deduction in computing the net income of the estate of trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries • • • but the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries whether distributed to them or not. Any amount allowed as a deduction under this paragraph shall not be allowed as a deduction under subsection (c) of this section in the same or any succeeding taxable year.

[fol. 62] The deed of trust clearly discloses an intention on the part of the grantor to make the annuities charges upon both the income and corpus of the estate held by the trustees at any time when payments of annuities should become due. The annuities were "payable at all events" and did not "depend upon income from the trust estate". The annuities were, therefore, gifts and the trustees were not entitled to deduct the amounts paid to the annuitants in 1931. Helvering v. Pardee, 290 U. S. 365; Burnet v. Whitehouse, 283 U. S. 148; Boston Safe Deposit & Trust Co. v. Commissioner, 66 Fed. (2d) 179 (affirming 26 B. T. A. 486); certiorari denied, 290 U. S. 700; Bridgeport City Trust Co., Trustee, 32 B. T. A. 1181.

The other question for decision is whether the petitioner is entitled to deduct "any part of the gross income" for 1931 under section 162 (a), which is as follows:

There shall be allowed as a deduction (in lieu of the deduction for charitable, etc., contributions authorized by section 23 (n), any part of the gross income, without limitation, which pursuant to the terms of the will or deed creating the trust, is during the taxable year paid or permanently set aside for the purposes and in the manner specified in section 23 (n), or is to be used exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, or for the establishment, acquisition, maintenance or operation of a public cemetery not operated for profit.

The petitioner contends that the gain from the sale of securities was deductible. It concedes that this particular gain was added to corpus and was not actually "paid" to anyone in 1931. But it contends that this income was "permanently set aside" during the taxable year for charitable purposes or "is to be used exclusively" for purposes mentioned in section 162 (a). The Board and the court to which this case would go upon appeal have held under somewhat similar circumstances that no deduction is allowed where such gains are merely added to the corpus of the trust in accordance with the trust instrument. Boston Safe Deposit & Trust Co. v. Commissioner, supra; Bank of America National Association, Trustee, 19 B. T. A. 1273; Charles W. Jaynes et al., [fol. 63] Trustees, 29 B. T. A. 259; Gertrude Hemler Tracy et al., Trustees, 30 B. T. A. 1156. See, contra, Hartford-Connecticut Trust Co. v. Eaton, 41 Fed. (2d) 69. This is because it can not be definitely determined during the taxable year that this part of the gross income of the trust has been permanently set aside for charitable purposes or is to be used exclusively for such purposes. As long as there is a possibility that the income may have to be used pursuant to the terms of the trust deed for purposes other than charitable ones, the deduction may not be allowed under the provisions of section 162 (a) and similar provisions of earlier acts. Here the same conclusion must be reached as was reached in the cases cited, since the grantor intended that not only this particular income, but also the corpus of the trust remaining at any given time, could be used to pay the annuities. Despite the large surplus of income over annuity payments in 1931, no funds of the trust were permanently set aside or were to be used exclusively for charitable purposes under this trust instrument, except such trust

funds as were actually paid to charities during that year. The exception does not apply to the gains from the sale of securities, since they were not paid to charities during that year.

The grantor of the trust made certain provisions to safeguard the payments to the annuitants. But he must have realized that as the annuity payments decreased some of the trust funds could be used for charitable purposes without endangering the payment of the gifts to annuitants, since the latter could be amply protected by the income and corpus of the remaining trust property. In the deed of trust he gave to the trustees authority to use funds of the trust for charitable purposes, under certain circumstances, during the lives of the annuitants. However, he did not direct them to use trust funds during that period for charitable purposes nor did he say whether they should use income or corpus in case they decided to make a gift to charity during that period. Yet it seems clear from the deed as a whole that the trustees had authority to pay the amounts to charities which they actually paid in 1931. They had authority to make such payments from any available source within the trust, i. e., they could use corpus, accumulated income, or [fol. 64] excess current earnings of 1931. Since their authority was so broad, it may be important to determine, if possible, the source from which the payments to charity were actually made.

The trustees chose to make the payments from and to charge them to income, rather than corpus. The facts as stipulated show that the trustees, in making their appropriations, did not have in mind the income of the current taxable year. They considered only the income available on June 2, 1931. That consisted principally of the accumulated income of a prior year. The accumulated income at the beginning of the year amounted to $187,999.43. They made appropriations of $180,000. They paid in 1931 $160,000 of the amount thus appropriated and $30,000 appropriated in 1929. These facts rather indicate that the trustees in 1931 really intended to distribute income theretofore accumulated rather than to distribute the current income of 1931. They charged the payments to income rather than to corpus. But the income account included both accumulated and current income. They did, of course, eliminate the gains from the sales of securities in 1931 by adding that to the corpus which

they did not intend to touch. They also allocated a part of the 1931 income to the payment of the annuities and current expenses of that year. This left about $80,000 of the gross income of 1931 unallocated. Income of prior year on hand at the beginning of the year 1931 in the amount of $187,999.43 was available for the payments to charities. The question is, How much, if any, of the gross income of 1931 was paid to the charities in 1931 and thus used for charitable purposes pursuant to the terms of the deed creating the trust within the meaning of section 162 (a)? The deduction is based upon the use of the income subject to tax and not upon the use of accumulated income of prior years.

Under some circumstances the arbitrary acts of fiduciaries have been deemed of no significance in determining whether or not a deduction is proper for the estate. Bowers v. Slocum, 20 Fed. (2d) 350; E. Sohier Welch et al., Trustees, 9 B. T. A. 1370; Hu L. McClung et al., Executors, 13 B. T. A. 335. The petition was not required to use income for payment of the gifts to charities. If the above cited cases apply the petitioner would not be entitled to any deduction merely [fol. 65] because the trustee chose to account for the payments to charities as made from income rather than from corpus. Any gifts actually paid from income of 1931 were in one sense paid pursuant to the deed of trust. The petitioner had the burden of showing the amount paid from gross income of 1931. The total payments made in 1931 exceeded the accumulated income on hand at the beginning of that year by $2,000.57. Thus the latter amount must have been paid from income of 1931. However, the petitioner has not shown that more than $2,000.57 of the $190,000 was paid from gross income of 1931, nor has it suggested any method of determining how much more of the $190,000 was paid out of gross income of 1931. Lynchburg Trust & Savings Bank et al., Trustees, 27 B. T. A. 1182 (reversed on other grounds, 68 Fed. (2d) 356). Even the impossibility of establishing the specific amount, made essential by statute as a prerequisite to the allowance of the deduction, does not justify a deduction computed arbitrarily, but leaves the taxpayer with an unenforceable claim. Burnet v. Houston, 283 U. S. 223. Here the Board has no way of determining how much of the $190,000 payments in excess of $2,000.57 might have been made from 1931 income and how much from prior accumulations. Some arbitrary allocation might be made, of course, but no sufficient justification for such proce-

dure appears. The right to a deduction must be proved and a failure of proof results in a loss of the deduction. Burnet v. Houston, supra; Reinecke v. Spalding, 280 U. S. 227, 233; United States v. Anderson, 269 U. S. 422, 443.

Reviewed by the Board.

Decision will be entered under Rule 50.

DISSENTING OPINION

SMITH, dissenting:

There appears to be no question but that the net income of the trust fund for 1931, before the deduction from the gross income of amounts paid to annuitants and amounts paid or set aside for charitable and educational purposes, was $164,339.39, as determined by the respondent. The trust paid to annuitants $22,356. The deduction of this amount was correctly disallowed by the respondent.

Section 162 (a) of the Revenue Act of 1928 permits the [fol. 66] deduction from the gross income of the trust of "any part of the gross income, without limitation, which pursuant to the terms of the will or deed creating the trust, is during the taxable year paid or permanently set aside for the purposes and in the manner specified in section 23(n)". The amount paid to charities by the trust during 1931 was $190,000 or an amount in excess of the total gross income for the year. I am of the opinion that under section 162(a) the petitioner was entitled to deduct from its gross income the full amount of $141,989.39, the difference between the net income as determined by the respondent and the amounts paid to annuitants. I can not believe that the theory invoked in the majority opinion to the effect that the trust must show from what receipts the payments to charities were made in order to have them deductible is responsive to the legislative intent. And it is the legislative intent which should control in the construction of the taxing statute.

It is further to be noted that the entire income of the trust fund was to be paid to charitable and other organizations referred to in section 23 (n) after the payment of expenses and annuities. If the trust fund is required to pay the tax determined by the Board in this case, the payment impinges upon the amount which would otherwise go to charities. In my opinion this was never contemplated by Congress and, as stated by the Supreme Court in Lederer v. Stockton, 260

U. S. 3: "To allow the technical formality of the trust, which does not prevent the Hospital from really enjoying the income, would be to defeat the beneficent purpose of Congress."

ARUNDELL, dissenting:

Beginning with the 1913 Revenue Act and down to date Congress has disclosed a progressively liberal attitude in dealing with contributions to charity. This beneficent purpose should not be defeated by a strained and technical approach. Stockton v. Lederer, 260 U. S. 3. In my opinion petitioner has clearly established its right to deduct a very large part of the sum actually paid by it to charities within the taxable year.

Trammell and Matthews agree with this dissent.

[fol. 67] BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

MOTION FOR DECISION UNDER RULE 50—Filed November 29, 1935

Now comes the Commissioner of Internal Revenue, by his attorney, Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue, and

Moves the Board to enter a decision redetermining the tax liability of the petitioner for the calendar year 1931, in accordance with the opinion of the Board promulgated under date of October 29, 1935, and as set forth in the statement attached hereto.

This proposed redetermination is submitted in accordance with the opinion of the Board without prejudice to the right of the petitioner or of the respondent to contest the correctness of the opinion pursuant to the statute in such cases made and provided.

Robert H. Jackson, Assistant General Counsel for the Bureau of Internal Revenue. Of Counsel: Hartford Allen, Special Attorney, Bureau of Internal Revenue.

No objection.

Francis V. Barstow, Counsel for Petitioner.

Statement

IT:AR:BTA-Recomp. AMK.

In re: Old Colony Trust Company, Trustee, Under Indenture of Trust of Paul Wilde Jackson, Boston, Massachusetts. BTA. No. 74928. Year 1931.

Net income, 60-day letter dated December 28, 1933:		
Ordinary net income		$102,858.07
Capital net gain		61,481.32
Total		$164,339.39
[fol. 68] Deduct:		
Contributions allowed in accordance with decision of the United States Board of Tax Appeals promulgated October 29, 1935		2,000.57
Total net income adjusted		$162,338.82
Less: Capital net gain included		61,481.32
Income subject to surtax		$100,857.50
Less: Dividends	$53,583.53	
Personal exemption	1,500.00	55,083.53
Income subject to normal tax		$45,773.97
Normal tax at 1½% on $4,000.00		60.00
Normal tax at 3% on $4,000.00		120.00
Normal tax at 5% on $37,773.97		1,888.70
Surtax on $100,857.50		11,831.50
Tax at 12½% on $61,481.32		7,685.17
Total tax		$21,585.37
Less: Income tax paid at source		495.60
Net tax liability		$21,089.77
Tax previously assessed		None
Deficiency in tax		$21,089.77

BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

DECISION—Entered December 13, 1935

Pursuant to the Board's opinion promulgated October 29, 1935, the respondent filed a recomputation and notice of settlement on November 29, 1935, on which was endorsed "No objection" by counsel for the petitioner. Therefore, it is

Ordered and decided that there is a deficiency in tax for the year 1931 in the amount of $21,089.77.

J. E. Murdock, Member, United States Board of Tax Appeals.

[fol. 69] BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

PETITION FOR REVIEW IN UNITED STATES CIRCUIT COURT OF APPEALS—Filed March 11, 1936

To the Honorable the Judges of the United States Circuit Court of Appeals for the First Circuit:

The petitioner above named by his attorney, Francis V. Barstow, respectfully represents as follows:

I. Jurisdiction

1. The petitioner is and at all times since a date prior to the execution of the deed of trust hereinafter mentioned has been a corporation organized under the laws of the Commonwealth of Massachusetts and a citizen and resident of said Commonwealth, having its principal place of business at 17 Court Street in Boston in said Commonwealth. In its capacity of trustee under said deed of trust it filed its ~~federal~~ income tax returns for the calendar year 1931 with the United States Collector of Internal Revenue for the District of Massachusetts at Boston, Massachusetts, whose office was and is located within the First Circuit.

2. The respondent, Guy T. Helvering, is the duly appointed, qualified and acting Commissioner of Internal

Revenue of the United States, holding his office by virtue of the laws of the United States.

3. This is a proceeding for review by the Circuit Court of Appeals for the First Circuit, pursuant to statute in such cases made and provided, of the action taken by the United States Board of Tax Appeals in its opinion promulgated October 29, 1935, and in its decision rendered pursuant to said opinion and entered December 13, 1935, redetermining that there is a deficiency in income tax due from the petitioner in its capacity of trustee under said deed of trust for the year 1931 in the sum of $21,089.77, this being (subject to a deduction of $500 upon recomputation) the sum previously determined by the Commissioner of Internal Revenue.

II. Nature of the Controversy

1. The petitioner is the surviving trustee under a deed of trust executed by Paul Wilde Jackson and dated July [fol. 70] 19, 1922. After certain provisions not now material the deed directs the trustees to pay specified annuities to various persons for their respective lives. Paragraph 13 of the deed is as follows:

"I authorize my said trustees to pay to charities as hereinafter described such sums as in their judgment may be paid without jeopardizing the annuities herein provided for, whenever for a period of one year the trust fund held by them as then invested shall have yielded a net income equal to twice the amount of the annuities which they are then required to pay, and upon the death of the survivor of those persons, who under the terms of this instrument are to receive annual incomes under the trust hereby created, I direct my said trustees to distribute the rest and residue remaining their hands among corporations and trustees organized, operating and holding exclusively for religious, charitable, scientific, literary or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, the sum paid over by said trustees to such corporations or boards of trustees to be held by such corporations and boards of trustees in trust, and the income thereof to be expended for the general purposes for which such corporations and boards of trustees are organized, and I request that said funds be designated by each corporation or board of trustees as the Henry Clay Jackson Fund."

2. The income of the trust for each year since the petitioner has held the principal has been more than twice the aggregate of the annuity payments required in such year by the terms of the trust. The petitioner has been advised that under these circumstances it has power to pay to charities defined in the trust instrument such parts of the principal and income of the trust as in its judgment can be paid without jeopardizing the annuities, except as it is provided by the deed of trust (in a paragraph subsequent to that quoted above) that the trustees, during the life of the grantor or his wife and daughter, shall confer with him or his wife and daughter before making a gift to charity. The grantor died June 21, 1928, his wife June 30, 1928, and his daughter October 26, 1923.

[fol. 71] 3. In the administration of the trust the petitioner has considered not only that it has power to make gifts from the principal and income of the trust to charities, but also that all of the trust property in excess of that part which it considers necessary for the trust expenses and annuity payment belongs to charities.

4. The first receipt of principal by the petitioner under the trust was on May 29, 1923, and upon that date separate ledger sheets for the principal and for the income (exclusive of profits from sales of corpus) of the trust were opened. The first receipt of income was on June 30, 1923. The principal (corpus) account has always been maintained separate and apart from the income account. No annuity payments or payments to charitable organizations have been charged on the books to the principal account, which account includes accumulated profits from sales of securities.

5. Since 1925 the petitioner has appropriated and/or paid certain sums to specific charities as hereinafter set forth. The grantor, while living, approved such gifts. The year, income (exclusive of profits) available as computed by the petitioner, appropriations, number of charities and the year in which payments were made as shown by the petitioner's records are as follows:

Year	Income Available	Amount Appropriated		Number of Charities		Year of Payment
1925 To April 16,	$60,000	$60,000		12		1925
1926 To June 11,	109,000	109,000		3		1926
1927 To June 2,	119,000	0		0		0
1928 To June 2,	214,000	100,000		1		1928
1929 To June 2,	201,000	200,000		1	$150,000	1930
					30,000	1931
					17,242 21	1932
1930 To June 2,	90,000	0		0		0
1931 To June 2,	180,000	180,000		6	160,000	1931
					20,000	1932
1932 To Dec. 31,	113,000	110,000	May 6, 1933	6		1933
1933 To Dec. 28,	60,000	60,000		2		1933

[fol. 72] 6. All of the appropriations mentioned above were made by formal action taken by a committee of the petitioner thereunto authorized and were duly recorded.

7. The market value of the trust corpus was $2,119,835.81 on January 1, 1931, and $1,488,140.43 on December 31, 1931. The accumulated income on hand on January 1, 1931, was $187,999.43, of which $50,000 had already been appropriated to the Boston Floating Hospital, a charity.

8. The income for the year 1931, exclusive of gains, amounted to $118,038.11. Deducting therefrom the annuity payments of $22,350 and the other expenses of $10,403.51 there remained a balance of $85,284.60 available for charities. The petitioner appropriated to five charities in the year 1931 $180,000, which with the $50,000 already appropriated to the Boston Floating Hospital represented a total appropriation to charities at the end of 1931 of $230,000. The amounts paid to charities during 1931 and the dates on which the respective payments were made were as follows, the payment of $30,000 listed under date of September 12 having been made in partial fulfillment of said appropriation of $50,000 to the Boston Floating Hospital.

August 12	$25,000
September 9	25,000
September 12	30,000
November 11	25,000
December 16	85,000
Total	$190,000

9. There remained at the end of 1931 $40,000 unpaid appropriations to charities. Payments aggregating $37,242.21 were made January 20, 1932, on account of these appropriations.

10. The gains from the sale of the securities of the trust in 1931 amounted to $60,901.82.

11. The cost of purchasing annuities for all of the annuitants of 1931 at their ages in that year, if purchased during the first six months of 1931 from the New York Life Insurance Company, would have been $200,804.33.

[fol. 73] 12. The petitioner's returns were made upon a cash receipts and disbursements basis.

13. The petitioner filed a fiduciary return for 1931 showing income apportioned to annuitants and to itself. It also filed an individual return for the same year in which it claimed as deductions on account of sums set aside for charitable and religious purposes amounts equal in the aggregate to the total net income, including capital gains. The Commissioner disallowed all deductions for income set aside for charitable and educational purposes and included the annuity payments as taxable income to the petitioner and determined that there was a deficiency with respect to the petitioner's federal income tax liability for the year 1931 in the sum of $21,589.91, which determination was set forth in a notice of deficiency dated December 28, 1933. On February 20, 1934, the petitioner filed with the United States Board of Tax Appeals a petition for the redetermination of the aforesaid deficiency. By said petition (as amended November 6, 1934) the petitioner contended that all net income of the year and all taxable income resulting from gains made in the year 1931 are deductible in determining the taxable income of the petitioner for the year 1931, pursuant to the terms of Section 162 (a) of the Revenue Act of 1928.

14. By his answer to said petition (as amended November 15, 1934) the Commissioner denied the errors of law and fact complained of by the petitioner.

15. The proceeding duly came on for hearing and was submitted to the Board of Tax Appeals on the basis of a written stipulation of facts and certain exhibits referred to therein and annexed thereto. Under date of October 29, 1935, the Board of Tax Appeals promulgated an opinion wherein the aforesaid stipulated facts and exhibits were, in substance, adopted as the findings of the Board and by which the Commissioner's contentions were, in substance,

sustained. Pursuant to said opinion the Board rendered its decision, which was entered under date of December 13, 1935, redetermined that upon recomputation there is a deficiency in income tax due from the petitioner in its capacity of trustee under said deed of trust for 1931 in the sum of $21,089.77.

[fol. 74] III. Assignments of Error

The petitioner, being aggrieved by the action of the United States Board of Tax Appeals and by the determination and conclusions of law made by the Board, is desirous to obtain a review thereof by the Circuit Court of Appeals for the First Circuit. As reasons for such review it alleges that the United States Board of Tax Appeals committed the following errors:

1. The Board's decision is contrary to law;

2. Statements and conclusions of fact contained in the Board's opinion are contrary to the stipulated facts adopted by the Board as its findings of fact;

3. The Board's conclusions of law and its decision are contrary to said stipulated facts;

4. The Board's conclusions of law and its decision are contrary to its findings of fact;

5. The Board erred in holding that gifts made to charities in 1931 were not deductible unless shown to have been made from gross income received by the trust in that year;

6. The Board erred in not holding that the petitioner is entitled to deduct from its gross income for 1931 the full amount of the difference between the net income as determined by the respondent and the amounts paid to annuitants;

7. The Board erred in not holding that the difference between the petitioner's net income for 1931 as determined by the respondent and the amounts paid to annuitants was during that year permanently set aside for charitable purposes or was to be used exclusively for such purposes within the meaning of Section 162 (a) of the Revenue Act of 1928;

8. The Board erred in not holding that the petitioner's gain from the sale of securities in 1931 was during that year

permanently set aside for charitable purposes or was to be used exclusively for such purposes within the meaning of Section 162 (a) of the Revenue Act of 1928;

9. The Board erred in holding that no deduction on account of gifts to charities was permissible from the income [fol. 75] of 1931 although it appeared from the stipulated facts that out of the income accumulated on January 1, 1931, $50,000 had been previously appropriated to charitabe purposes, so that the balance which remained was less than the amount paid or permanently set aside from income in the year 1931 for charitable purposes within the meaning of Section 162 (a) of the Revenue Act of 1928.

Wherefore the petitioner prays that the action taken by the United States Board of Tax Appeals in this proceeding be reviewed by the United States Circuit Court of Appeals for the First Circuit, that a transcript of the record be prepared in accordance with law and with the rules of said court and transmitted to the clerk of said court for filing and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said court.

Old Colony Trust Company, by its Attorney, Francis V. Barstow.

Duly sworn to by Francis V. Barstow. Jurat omitted in printing.

[fol. 76] Before United States Board of Tax Appeals

[Title omitted]

Notice of Filing Petition for Review—Filed March 11, 1936

To Robert H. Jackson, Esq., Assistant General Counsel for the Bureau of Internal Revenue, Washington, D. C.:

You are hereby notified that the above-named petitioner did on this day file with the clerk of the United States Board of Tax Appeals at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the First Circuit of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review

and the assignments of error as filed is hereto attached and served upon you.

Dated this — day of March, 1936.

Francis V. Barstow, Attorney for Old Colony Trust Company, Petitioner on Review.

Service acknowledged, including copy of petition for review and assignments of error, this eleventh day of March, 1936.

Herman Oliphant, General Counsel for the Department of the Treasury, Attorney for Respondent.

BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

PRÆCIPE FOR RECORD—Filed March 11, 1936

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit and deliver to the clerk of the duly certified as correct of the following documents and records in United States Circuit Court of Appeals for the First Circuit copies the above-entitled cause in connection with the petition for review by the Circuit Court of Appeals for the First Circuit heretofore filed by the Old Colony Trust Company, trustee under the indenture of trust referred to in said petition:

1. Docket entries of the proceedings before the Board.

[fol. 77] 2. Pleadings before the Board, to wit,

(a) Petition (filed February 20, 1934);

(b) Answer to petition (filed April 21, 1934);

(c) Amendment to petition (allowed November 6, 1934);

(d) Amendment to answer (allowed November 14, 1934);

(e) Commissioner's settlement under Rule 50 (filed November 29, 1935) including attached recomputation.

3. Opinion and decision of the Board, to wit:

(a) Opinion (including dissenting opinion) promulgated October 29, 1935;

(b) Stipulation of facts (including the several exhibits thereto annexed) which stipulation and exhibits were adopted as the Board's findings by reference.

(c) Decision entered December 13, 1935.

4. Petition for review and assignments of error filed March —, 1936.

5. Notices of filing petition for review, with proofs of service endorsed thereon.

6. This præcipe, notice of filing and proof of service.

Francis V. Barstow, Attorney for Old Colony Trust Company, Petitioner on Review.

BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

NOTICE OF FILING PRÆCIPE FOR RECORD—Filed March 11, 1936

To the Honorable Guy T. Helvering, Commissioner of Internal Revenue, Washington, D. C.:

You are hereby notified that the above-named petitioner did on the eleventh day of March, 1936, file with the clerk of the United States Board of Tax Appeals at Washington, D. C., a præcipe for record in the above-entitled proceeding. A copy of the præcipe for record is hereto attached and served upon you.

[fol. 78] Dated this eleventh day of March, 1936.

Francis V. Barstow, Attorney for Old Colony Trust Company, Petitioner on Review.

Service of the foregoing notice, together with a copy of the præcipe for record mentioned therein, acknowledged this eleventh day of March, 1936.

Herman Oliphant, General Counsel for the Department of the Treasury, Attorney for Respondent.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 79] In United States Circuit Court of Appeals for the First Circuit October Term, 1935.

No. 3146

Commissioner of Internal Revenue, Petitioner for Review,

v.

Old Colony Trust Company, Trustee

Before United States Board of Tax Appeals

[Memorandum.—The following papers being already printed in the record on the petition for review by the taxpayer at the pages indicated are here omitted:

	Printed at page
Docket entries	1
Petition with deficiency notice	3
Answer	20
Amendment to Petition	21
Answer to Amendment to Petition	22
Stipulation of Facts with Exhibits A to F, inclusive	22
Opinion of the Board of Tax Appeals	56
Decision	68

A. J. Charron, Clerk.]

Before United States Board of Tax Appeals

[Title omitted]

Petition for Review and Assignments of Error—Filed March 11, 1936

To the Honorable Judges of the United States Circuit Court of Appeals for the First Circuit:

Now comes Guy T. Helvering, Commissioner of Internal Revenue, by his attorneys, Robert H. Jackson, Assistant [fol. 80] Attorney General, Herman Oliphant, General Counsel for the Department of the Treasury, and Hartford Allen, Special Attorney for the Bureau of Internal Revenue, and respectfully shows,

I. Jurisdiction

The petitioner on review (hereinafter referred to as the commissioner) is the duly appointed, qualified and acting Commissioner of Internal Revenue of the United States, holding his office by virtue of the laws of the United States.

The respondent on review, Old Colony Trust Company, trustee under an indenture of trust of Paul Wilde Jackson (hereinafter referred to as the taxpayer) is a corporation organized under the laws of the Commonwealth of Massachusetts, with its principal place of business located at Boston, Massachusetts.

The taxpayer filed income tax returns for the calendar year 1931 (Forms 1040 and 1041) with the Collector of Internal Revenue for the District of Massachusetts, whose office is located at Boston, Massachusetts, and within the judicial circuit of the United States Circuit Court of Appeals for the First Circuit.

The Commissioner files this petition pursuant to the provisions of Sections 1001, 1002 and 1003 of the Revenue Act of 1926, as amended by Section 603 of the Revenue Act of 1928, as amended by Section 1101 of the Revenue Act of 1932, as amended by Section 519 of the Revenue Act of 1934.

II. Prior Proceedings

On December 28, 1933, the Commissioner determined a deficiency in income tax against the taxpayer for the year 1931 in the amount of $21,589.91 and sent by registered mail a notice of said deficiency in accordance with the provisions of Section 272 (a) of the Revenue Act of 1928. Thereafter, and on February 20, 1934, the taxpayer filed an appeal from the said determination with the United States Board of Tax Appeals, contesting the amount of the deficiency determined by the Commissioner as aforesaid. The Commissioner filed his answer to the said petition on April 21, 1934, denying the allegations of error contained in said petition. The case was tried before the United States Board of Tax Appeals on November 21, 1934.

[fol. 81] On October 29, 1935, the Board promulgated its opinion and on December 13, 1935, entered its decision, wherein it was ordered and decided that there is a deficiency in income tax due from the taxpayer for the calendar year 1931 in the amount of $21,089.77.

III. Nature of Controversy

The Old Colony Trust Company, the taxpayer herein, is the surviving trustee under a deed of trust executed by Paul Wilde Jackson on July 19, 1922. The trust indenture provided for certain distributions in connection with the trust property, including payments to charitable organizations.

During the year in controversy, viz., 1931, the total payments made to charities amounted to $190,000. The Commissioner determined that the net income of the trust for the year 1931 (including capital net gain) amounted to $164,339.39. The accumulated income of the trust at January 1, 1931, was $187,999.43. The cash balance at the same date amounted to $193,779.43.

The question presented to the Board was whether the distribution of the $190,000 constituted an allowable deduction from the gross income of the trust under the provisions of Section 162 (a) of the Revenue Act of 1928.

The Commissioner contended that there was no provision in the deed of trust to the effect that the payments to charitable beneficiaries could be disbursed exclusively from income, that such payments therefore could invade the corpus, and hence were not deductible from the gross income of the trust.

The Commissioner further contended that, if the Board should hold that under the provisions of the trust deed the payments could be made from income, then such payments, in order to be deductible from the gross income of the trust, must be shown to have been made out of the gross income for the year in which the deductions are claimed.

The Board denied the first contention of the Commissioner and held that of the total payment of $190,000 the amount of $2,000.57 was allowable as a deduction from gross income for the year 1931. The latter sum—in conformity with the theory advanced by the Commissioner's second contention [fol. 82]—was held to have been paid out of the current 1931 gross income, and the balance of $187,999.43 paid out of the accumulated income as at January 1, 1931.

The propriety of the Board's denial of the Commissioner's contention referred to above is presented for review.

IV. Assignments of Error

The Commissioner avers that in the record and proceeding before the Board of Tax Appeals and in the opinion

and final decision rendered and entered by the Board of Tax Appeals manifest error occurred and intervened to the prejudice of the Commissioner who now assigns the following errors and each of them, which he avers occurred in the said record, proceeding, opinion and final decision so rendered and entered by the Board of Tax Appeals:

1. The Board erred in holding that the taxpayer was entitled to a deduction from gross income for the year 1931 of an amount of $2,000.57 paid to charitable organizations.

2. The Board erred in holding that the amount of $2,000.57 was paid out of the gross income of the estate created under the trust indenture.

3. The Board erred in failing to hold that the amount of $2,000.57 was paid out of the corpus of the estate created under the trust indenture.

4. The Board erred in holding that the trust indenture provided that payments to charitable organizations could be made out of the gross income of the trust estate.

5. The Board erred in holding that under the provisions of the trust indenture the contributions to charitable organizations were paid, or were payable, exclusively from the gross income of the trust estate.

6. The Board erred in failing to hold that under the provisions of the trust indenture contributions to charitable organizations were paid, or were payable, out of the corpus of the trust estate.

7. The Board erred in failing to hold that under the provisions of the trust indenture contributions to charitable organizations were paid, or were payable, exclusively from the corpus of the trust estate.

[fol. 83] 8. The Board erred in finding a deficiency in income tax due from the taxpayer for the year in controversy in the amount of only $21,089.77.

9. The Board erred in failing to find that there was a deficiency in income tax due from the taxpayer for the year 1931 in the amount of $21,589.91.

Wherefore, the Commissioner petitions that the decision of the Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the First Circuit, that

a transcript of the record be prepared in accordance with the law and with the rules of said court for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said court.

Robert H. Jackson, Assistant Attorney General. Herman Oliphant, General Counsel for the Department of the Treasury. Of Counsel: Hartford Allen, Special Attorney, Bureau of Internal Revenue.

Duly sworn to by Hartford Allen. Jurat omitted in printing.

[fol. 84] BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

NOTICE OF FILING PETITION FOR REVIEW—Filed March 18, 1936

To Old Colony Trust Company, Trustees under an Indenture of Trust of Paul Wilde Jackson, 17 Court Street, Boston, Massachusetts; Francis V. Barstow, Esq., 53 State Street, Boston, Massachusetts:

You are hereby notified that the Commissioner of Internal Revenue did, on the eleventh day of March, 1936, file with the clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the First Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you

Dated this eleventh day of March, 1936.

Herman Oliphant, General Counsel for the Department of the Treasury.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of errors mentioned therein, is hereby acknowledged this twelfth day of March, 1936.

Old Colony Trust Company, by C. M. Gordon Trust, Respondent on Review. Francis V. Barstow, Attorney for Respondent on Review.

BEFORE UNITED STATES BOARD OF TAX APPEALS

[Title omitted]

PRÆCIPE FOR RECORD—Filed April 7, 1936

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit and deliver to the clerk [fols. 85-86] of the United States Circuit Court of Appeals for the First Circuit copies duly certified as correct of the following documents and records in the above-entitled cause in connection with the petition for review by the said Circuit Court of Appeals for the First Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries of proceedings before the Board.
2. Pleadings before the Board:
   (a) Petition, including copy of deficiency notice.
   (b) Answer.
   (c) Amendment to Petition.
   (d) Answer to Amendment to Petition.
3. Opinion of Board.
4. Decision of Board.
5. Petition for review and notices of filing.
6. Stipulation of facts, including Exhibits A, B, C, D, E and F.
7. This præcipe.

Herman Oliphant, General Counsel for the Department of the Treasury.

Service of a copy of the within præcipe is hereby admitted this fourth day of April, 1936.

Francis V. Barstow, Attorney for Respondent on Review.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 87] IN UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE FIRST CIRCUIT, OCTOBER TERM, 1936

No. 3145

OLD COLONY TRUST COMPANY, Trustee,

Petitioner for Review,

v.

COMMISSIONER OF INTERNAL REVENUE

No. 3146

COMMISSIONER OF INTERNAL REVENUE, Petitioner for Review,

v.

OLD COLONY TRUST COMPANY, Trustee.

Appeals from Board of Tax Appeals

Before Bingham, Wilson and Morton, JJ.

OPINION OF THE COURT—Filed December 10, 1936

WILSON, J.:

These cases are brought before this court on petitions filed March 11, 1936, one by the Old Colony Trust Company as Trustee (hereinafter referred to as the trustee or taxpayer) under an indenture executed by Paul Wilde Jackson, and a cross-petition filed by the Commissioner of Internal Revenue, each petitioner seeking a review of the decision of the Board of Tax Appeals entered December 13, 1935, determining a deficiency tax against the trustee for the calendar year 1931, of $21,089.77. On petitions for review of decisions of the Board of Tax Appeals only questions of law are open for consideration by this court.

[fol. 88] The question presented by the taxpayer's petition for review and assignments of error is whether the Board of Tax Appeals erred as a matter of law in that its decision is contrary to the stipulation of facts in the case and to its findings of fact, and also erred in finding that a deficiency tax of $21,089.77 was due from the taxpayer. The main question presented by the Commissioner's peti-

tion for review and assignments of error is whether the Board of Tax Appeals, in computing the taxable income of the taxpayer for that year, erred in holding that the sum of $2,000.57 was paid by the taxpayer from the gross income of the year 1931 to charitable organizations and not from the corpus of the trust, and that the taxpayer was entitled to a deduction of that amount in determining its taxable income for that year.

The statute determinative of the questions submitted is Sec. 162 of the Revenue Act of 1928, which provides that the net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, except that—

(a) There shall be allowed as a deduction [in lieu of the deduction for charitable, etc., contributions authorized by section 23(n)] any part of the gross income, without limitation, which pursuant to the terms of the will or deed creating the trust, is during the taxable year paid or permanently set aside for the purposes and in the manner specified in section 23(n), or is to be used exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, or for the establishment, acquisition, maintenance or operation of a public cemetery not operated for profit.

The deed of trust, after providing for certain legacies and also for the payment of stated annuities to a number of individuals, contained the following provisions:

"13. *I authorize* my said trustees to pay to charities as hereinafter described such sums as in their judgment may be paid without jeopardizing the annuities herein provided for, whenever for a period of one year the trust fund held by them as then invested shall have yielded a net income equal to twice the amount of the annuities which they are then required to pay, and upon the death of the survivor [fol. 89] of those persons, who under the terms of this instrument are to receive annual incomes under the trust hereby created, *I direct* my said trustees to distribute the rest and residue remaining in their hands among corporations and trustees organized, operating and holding exclusively for religious, charitable, scientific, literary or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, the sum

paid over by said trustees to such corporations or boards of trustees to be held by such corporations and boards of trustees in trust, and the income thereof to be expended for the general purposes for which such corporation and boards of trustees are organized, and I request that said funds be designated by each corporation or board of trustees as the Henry Clay Jackson Fund." (Italics supplied.)

These are the only sections of the statute and provisions of the trust deed that it is necessary to consider in disposing of these cases. The government in its brief contends, and we think correctly, that in order for payments to charitable institutions from the income of any particular year to be deductible, they must be directed by the person creating the trust and not be left to the judgment of the fiduciary. Bowers v. Slocum et al., 20 Fed. (2d) 350, 352; Guaranty Trust Co. of New York, Exr., v. Commissioner, 31 B. T. A. 19, 22; Charles P. Moorman Home for Women et al. v. United States, 42 Fed. (2d) 257, in which latter case the court said (pp. 260, 261):

"The quoted language of section 219 of the act of 1918 makes it clear that the trust income, to be exempt from taxation as a charitable contribution, must be paid to or permanently set aside during the taxable year for a corporation organized and operated exclusively for charitable purposes, and that such payment or permanent setting aside must be pursuant to the terms of the instrument creating the trust. In other words, the instrument creating the trust must make it clear that it was the intention of the creator of the trust that such income should be paid during the taxable year to the charitable corporation or permanently set aside to it during such taxable year. The statute makes it very clear that it was not the intention of Congress to make the taxability of the income for any taxable year de-[fol. 90] pend upon the discretion of the trustee in paying or permanently setting aside the income of the trust to the charitable purpose during the taxable year, but to depend solely upon the provisions of the instrument creating the trust."

* * * * * * *

"Section 219(b) of the Revenue Act of 1924 grants the exemption, not only in cases where the income has been paid to or permanently set aside for the charitable purpose

during the taxable year, but also in those cases where the income received during the taxable year is to be used exclusively for the charitable purpose. As in the acts of 1918 and 1921, however, the determining factor is the instrument creating the trust, and not the discretion of the trustee. Therefore, under the 1924 act, unless it appears from the instrument creating the trust that the income from which exemption is sought is set aside in the instrument creating the trust exclusively for a charitable purpose, or under the terms of that instrument is to be paid during the taxable year or permanently set aside during that year for the charitable purpose, it is not exempt."

Boston Safe Deposit & Trust Co. v. Commissioner, 66 Fed. (2d) 179, 183.

Article 862 of Treasury Regulation 74 promulgated under the Revenue Act of 1928 evidently construing Sec. 162 of that Act, provides as follows:

"(1) If the terms of the will or of the deed creating the trust direct that any part of the gross income of the estate or trust (a) be paid or permanently set aside for charitable or other purposes, as specified in section 23(n), or (b) be used exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, or for the establishment, acquisition, maintenance, or operation of a public cemetery not operated for profit, such gross income so paid or set aside during the taxable year shall be allowed as a deduction in lieu of the deduction authorized by section 23(n)."

The same rule is applied in determining estate taxes in case of bequests to charitable institutions. If the bequests in the will are specific, that is, to some named charitable institutions, the bequest is exempt from the estate tax, but [fol. 91] if the gift is left to the discretion of a fiduciary under the terms of the will, it is held to be taxable. Helvering v. Pardee, Case No. 77,290 U. S. 365, 370-1; Burnet v. Whitehouse, 283 U. S. 148; Mississippi Valley Trust Co. v. Commissioner, 72 Fed. (2d) 197.

Unless the trust instrument, therefore, unqualifiedly requires a distribution of the income of any year to charitable institutions, a deduction of the amount of such distribution is not permissible in computing the income tax for that year. State Savings Loan & Trust Co. v. Commissioner, 63 Fed.

(2d) 482. Distribution by a fiduciary in its discretion under authority vested in him in the trust deed does not entitle the taxpayer to a deduction from the gross income of any year.

Applying this principle to Sec. 13 of the deed of trust, the trustor first *authorized* the trustees to pay to charitable institutions such sums as in their judgment may be paid without jeopardizing the annuities therein provided for, and whenever for a period of one year the trust fund held by them as then invested shall have yielded a net income equal to twice the amount of the annuities which they are required to pay. It is evident from this language that the surviving trustee is not directed by the deed of trust to make any payments to charitable institutions until the death of the last survivor of the annuitants. It may, however, if in the judgment of the trustee the annuities are not jeopardized, make advance payments to charitable institutions under the authority given it in Par. 13 of the deed of trust, either from the corpus of the trust or from what the trustee terms "accumulated income" of past years, or from income of the current year; but any payments to charities from the current income of any year merely by virtue of the authority vested in the trustee under the deed of trust, are not directed by the trustor and are not deductible from the gross income of the year in which the payments are made in computing the income tax for that year.

While the beneficent purpose of Congress in exempting payments to charitable organizations from taxation is well recognized, an exemption, even of this nature, must be clearly authorized by Congress. Sun-Herald Corp. v. Duggan, 73 Fed. (2d) 298, 300.

[fol. 92] The Board of Tax Appeals found that the sum of $2,000.57 was paid from the income of 1931 to charitable institutions and was deductible in determining the income tax of that year. The Commissioner contends that this sum was paid from the corpus of the trust and that the entire income of 1931, with the usual deductions allowed to an individual, is subject to an income tax.

According to the findings of the Board of Tax Appeals, the Commissioner was wrong in contending that this amount was paid from the corpus of the trust. From the stipulation of facts the Board was right in holding that it was paid

from income. However, under our construction of the statutes and the deed of trust, it makes no difference in computing the tax from what source it was taken, since it was not *directed* to be paid to charities by the trustor under the deed of trust.

Nor can it be held that any part of the income for the year 1931 was, by direction of the trustor in the deed of trust, set aside permanently for charities, or to be so used, since it might at any time be used for payments to charities in the discretion of the trustee whenever the income for any one year equaled twice the amount due the annuitants for that year. Under the deed of trust it was not until the last survivor of those entitled to receive income thereunder had died that the trustee can be said to have been directed to distribute to charities any part of the trust fund or income thereof remaining in the hands of the trustee.

It is, therefore, held that no part of the gross income for the year 1931 was, under the deed of trust by direction of the trustor, paid or permanently set aside, or was to be used for distribution to charities; and the Board erred in deducting the sum of $2,000.57 from the gross income in computing the income tax of the trust for that year. Upon this record the amount of the tax as computed by the Commissioner in the first instance was correct, even though he erred as to the source of the payment of $2,000.57.

The cases are remanded to the Board of Tax Appeals for further proceedings in accordance with this opinion.

[fol. 93] Dissenting Opinion—Filed December 10, 1936

Morton, J. (dissenting):

The statute allows as a deduction "any part of the gross income * * * which pursuant to the terms of the will or deed creating the trust" is paid to charities as defined by the Act. In the present case the deed of trust expressly *authorized* the trustee to pay to charities "such sums" (not necessarily income) as in its judgment might be so paid without jeopardizing certain specified annuities, and directed that on the termination of the annuities the entire fund should be so paid. Under this provision the trustees made payments to certain proper charities.

The question is whether these payments are deductible from the income of the trust. It is a very narrow question,

depending on what is meant by the statutory expression, "pursuant to the terms of the will or deed." The majority opinion holds that these words covered only payments absolutely *directed* or *required* to be made by the will or deed in question.

I think this construction unduly narrows the statute. "Language used in tax statutes should be read in the ordinary and natural sense." Helvering, Commissioner, v. San Joaquin Co., 297 U. S. 496, 499. "Pursuant to" is by no means the equivalent of *directed* or *required*. Its common synonyms are "under," "in accordance with," or "authorized by." The phrase as used in this statute seems not to have been judicially defined except in Moorman Home v. United States, 42 Fed. (2d) 257, a District Court case which is followed in the majority opinion. In other statutes, and in indictments, it has always been given its natural meaning. As used in an old English statute, it was held to cover anything done in good faith, "either under the powers which the Act gives or in the discharge of the duties which it imposes." Smith v. Shaw, 10 B. & C. (Eng.) 277. See too Hermann v. Seneschal, 13 C. B. n. s. 392. "Pursuant to law" used in United States Revised Statutes, sec. 848 (28 U. S. C. A. sec. 601) has also been given a broad construction. Hanchett v. Humphrey, 93 Fed. 895, 896; United States v. Sanborn, 28 Fed. 299, 302 (C. C. Mass.), reversed on other grounds. United States v. Nunnemacher, 7 Bissell [fol. 94] (U. S.) 129, 137, and United States v. Boyden, 1 Lowell (U. S.) 266, show how the phrase has been construed in indictments. See also Spring v. Robinson, 2 Pinney (Wis.) 97, 99.

The interpretation placed upon the statute in the majority opinion seems to me to be completely at variance with the ordinary understanding of the phrase used and with the long recognized judicial interpretation of it. It is well settled that provisions in favor of charities should receive, as against the government, a liberal interpretation in order to encourage such gifts. This purpose is certainly not furthered by straining the language of the Act, so as to refuse the deduction on payments to charity authorized by a will or deed to be made if certain facts exist, the determination as to the required facts being left to the discretion of trustees. The decisions relied on in the majority opinion relate to other statutes, not containing the phrase in ques-

tion, and to essentially different questions and facts. They do not seem to me significant on the present question, except perhaps the observation in Burnet v. Whitehouse, 283 U. S. 148 that, "The exemption • • • is plain and should not be destroyed by any strained construction of general language," etc. (McReynolds, J., p. 151). Under this statute I think that any payment to charity as therein defined which is authorized by the will or deed is an allowable deduction.

[fols. 95-96] In United States Circuit Court of Appeals

Minute Entry of Hearing

On October 16, 1936, these causes came on to be heard together, and were fully heard by the court, Honorable George H. Bingham, Honorable Scott Wilson and Honorable James M. Morton, Jr., Circuit Judges, sitting.

In United States Circuit Court of Appeals

Final Decree—December 10, 1936

This cause came on to be heard October 16, 1936, upon the record on cross petitions for review of the United States Board of Tax Appeals, and was argued by counsel.

Upon consideration whereof, it is now, to wit, December 10, 1936, here ordered, adjudged and decreed as follows: The case is remanded to the Board of Tax Appeals for further proceedings in accordance with the opinion passed down this day.

By the Court, Arthur L. Charron, Clerk.

Recital as to Stay of Mandate

Thereafter, to wit, on January 5, 1937, mandate was stayed until further order of court.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 97] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 15, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 41,243. United States Circuit Court of Appeals, First Circuit. Term No. 703. Old Colony Trust Company, Trustee, Petitioner, vs. Commissioner of Internal Revenue. Petition for a writ of certiorari and exhibit thereto. Filed February 4, 1937. Term No. 703, O. T., 1936.